(10)

No. 95-1352-CFX Title: Gary Edwards and Tana Wood, Petitioners
v.
Jerry B. Balisok

Docketed: February 23, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 20 1996	Petition for writ of certiorari filed. (Response due March 24, 1996)
	Mar 22 1996	Brief of respondent Jerry Balisok in opposition filed.
	Mar 28 1996	Motion of respondent for leave to proceed in forma pauperis filed.
	Apr 3 1996	DISTRIBUTED. April 19, 1996
	Apr 3 1996	Reply brief of petitioners filed.
	Apr 22 1996	REDISTRIBUTED. April 26, 1996
	Apr 29 1996	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Apr 29 1996	Petition GRANTED. SET FOR ARGUMENT November 13, 1996. **********
	May 28 1996	Order extending time to file brief of petitioner on the merits until June 28, 1996.
	Jun 28 1996	Joint appendix filed.
	Jun 28 1996	Brief of petitioners Gary Edwards and Tana Wood filed.
	Jun 28 1996	Brief amici curiae of California, et al. filed.
	Jul 8 1996	Order extending time to file brief of respondent on the merits until August 2, 1996.
	Aug 1 1996	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Aug 2 1996	Brief of respondent Jerry Balisok filed.
	Aug 30 1996	Record filed.
	Aug 30 1996	Record filed.
	Sep 3 1996	Reply brief of petitioners Gary Edwards and Tana Woods filed.
	Sep 10 1996	CIRCULATED.
	Nov 13 1996	ARGUED.

1PP

Supreme Court, U.S.
FILED
FEB 20 1996
OFFICE OF THE CLERK

NO. 95-1352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TALIS MERLE ABOLINS
JOHN SCOTT BLONIEN*
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
Assistant Attorneys General
*Counsel of Record**
Counsel for Petitioners

P. O. Box 40116
Olympia, Washington 98504-0116
(360) 586-1445

February 1996

QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time?

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. STATUTORY PROVISIONS 2

IV. STATEMENT OF THE CASE 3

A. The State Prison Disciplinary Proceeding 3

B. Proceedings Below 4

V. REASONS FOR GRANTING THE WRIT 9

A. This Case Presents an Important Question Left Unresolved in *Heck v. Humphrey*. 9

B. There is a Continuing Conflict Between *Preiser v. Rodriguez* and *Wolff v. McDonnell*. 13

C. There is a Conflict Among the Federal Circuits. . 17

D. This Case is Important Because it Concerns a Source of Frequent Litigation that Involves a Substantial State Interest. 21

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Cases — Page

Afroyim v. Rusk,
387 U.S. 253 (1967) 17

Armento-Bey v. Harper,
68 F.3d 215 (8th Cir. 1995) 18

Best v. Kelly,
39 F.3d 328 (D.C. Cir. 1994) 20

Bowen v. Massachusetts,
487 U.S. 879 (1988) 21

Christianson v. Colt Industries Operating Corp.,
486 U.S. 800 (1988) 21

Clark v. Thompson,
960 F.2d 663 (7th Cir. 1992) 16, 18

Coleman v. Coombe,
65 N.Y.2d 777, 482 N.E. 2d 562,
492 N.Y.S.2d 944 (N.Y. 1985) 12

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 17

Ex parte Royall,
117 U.S. 241 (1886) 13

Fulford v. Klein,
529 F.2d 377 (5th Cir. 1976)
adhered to en banc, 550 F.2d 342
(5th Cir. 1977) 23

Gotcher v. Wood,
66 F.3d 1097 (9th Cir. 1995) 8, 9, 18

Gwin v. Snow,
870 F.2d 616, (11th Cir. 1989) 18, 21

Heck v. Humphrey,
512 U.S. ___, 114 S. Ct. 2364 (1994) 6, 8-13, 15, 22

In re Hunter,
43 Wn. App. 174, 715 P.2d 1146 (1986) 11

In re Reismiller,
101 Wn.2d 291, 678 P.2d 323 (1984) 11

Leonard v. Hammond,
804 F.2d 838 (4th Cir. 1986) 20

Offet v. Solem,
823 F.2d 1256 (8th Cir. 1987) 18-20

Parratt v. Taylor,
451 U.S. 527 (1981) 17

Preiser v. Rodriguez,
411 U.S. 475 (1973) 9, 13-16, 19, 23

Rodriguez v. McGinnis,
451 F.2d 730 (2d Cir. 1971) 14

Rodriguez v. McGinnis,
456 F.2d 79 (2d Cir. 1972) 14

Serio v. Members of Louisiana State Board of Pardons,
821 F.2d 1112 (5th Cir. 1987) 17-19

Shea v. Edwards,
221 Ill. App. 3d 219, 581 N.E. 2d 822,
163 Ill. Dec. 668 (Ill. App. 1991) 11

State v. Balisok,
123 Wn.2d 114, 866 P.2d 631 (1994) 3, 7

Viens v. Daniels,
871 F.2d 1328 (7th Cir. 1989) 20

Wolff v. McDonnell,
418 U.S. 539 (1974) 6, 8, 10, 13-16, 19

Young v. Kenny,
907 F.2d 874 (9th Cir. 1990) 6, 8, 18

Statutes & Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(b) 2

42 U.S.C. § 1983 ..... 2, 4, 9, 12, 14,15, 16

Other Authorities

Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*,
37 DePaul L. Rev. 85-88, 118, 121-25 (1988) 17, 22

Wash. Admin. Code § 137-28 3

Washington Rules of Appellate
Procedure 16.9 and 16.11 22

NO. _____

**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

v.

JERRY B. BALISOK,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The United States District Court for the Eastern District of Washington entered its Order Denying Defendants' Motion To Dismiss and Staying Action, and certified the case for immediate appeal. App. F. Following timely appeals by all parties, the

United States Court of Appeals for the Ninth Circuit reversed and remanded. App. A. Both decisions are unreported.

II. JURISDICTION

The court of appeals entered its judgment on November 22, 1995. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS

28 U.S.C. § 2254(b) provides, "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

42 U.S.C. § 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV. STATEMENT OF THE CASE

Respondent Jerry Balisok is an inmate in the custody of the Washington State Department of Corrections (DOC), pursuant to a 240 month sentence for attempted murder in the first degree. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Shortly after his conviction, Mr. Balisok was transferred to the Washington State Penitentiary (WSP), in Walla Walla, Washington. During his stay at WSP, Mr. Balisok became known by the United States District Court for the Eastern District as "an inmate who has filed numerous lawsuits ... [and who] assists other inmates with their legal actions " App. F-3.

A. The State Prison Disciplinary Proceeding

Like all prisons within the DOC, officials at WSP enforce a prison disciplinary code, which sets forth a broad range of prison misconduct. Chapter 137-28 Washington Administrative Code (WAC). Violations of this code can result in a number of sanctions, including a loss of good-time credits.

In August of 1993, Mr. Balisok was notified that he had been charged with violations of the prison's disciplinary code. According to the infraction report, an investigation revealed that Mr. Balisok had threatened to label inmate John Adams as a "snitch" in an effort to blackmail Adams into reporting that an

innocent person had stolen answers to a test from the WSP education department. App. K-1 to K-3.

On August 20, 1993, Mr. Balisok appeared at a prison disciplinary proceeding before Lt. Gary Edwards. Mr. Balisok denied that he was guilty of the rule violations, and claimed that Adams had set him up in order to avoid his own responsibility for the stolen test answers. App. K-1 to K-3, L-1 to L-4. Mr. Balisok also complained that he was unable to present exculpatory evidence. App. K-2.

Lt. Edwards found Mr. Balisok guilty based upon documentation from an investigation, including a written report by a Custody Unit Supervisor. Lt. Edwards recommended that Mr. Balisok receive a sanction which included a loss of 30 days good-time credits. App. K-2 to K-3.

Mr. Balisok appealed the finding and sanction to Petitioner Tana Wood, the WSP superintendent. The appeal was rejected because it exceeded the 2-page limit, and the sanctions were imposed. Mr. Balisok then asked that his appeal be reconsidered. Ms. Wood responded by affirming the disciplinary finding and sanctions. App. H-5, F-3.

B. Proceedings Below

On December 10, 1993, Mr. Balisok filed a civil rights complaint under 42 U.S.C. § 1983 alleging that Petitioners Lt. Gary Edwards and Superintendent Tana Wood violated his due

process rights at a prison disciplinary hearing which resulted in the loss of 30 days good-time credits. App. H. In his original complaint, Mr. Balisok alleged that Petitioner Edwards failed to admit and consider exculpatory witness statements, and failed to provide a written report specifying the documents and testimony on which the disciplinary sanction was based. Mr. Balisok also alleged that Petitioner Wood violated his rights when she refused to reverse the unconstitutional disciplinary finding, remove the false infractions from his record, and restore his good-time credits. App. H-4, H-7 to H-24.

For relief, Mr. Balisok requested: (1) a declaratory judgment that Petitioner Edward's decision to deprive Mr. Balisok of 30 days good-time credits deprived him of liberty without due process; (2) a declaratory judgment that Petitioner Wood's refusal to reverse the disciplinary decision and remove the infractions violated his right to due process; (3) an injunction mandating removal of the infractions from his record and all residual effects stemming therefrom; and (4) compensatory and punitive damages in the amount of $80,000. App. H-24 to H-34.

On March 23, 1994, the Petitioners moved to stay the litigation pending Mr. Balisok's exhaustion of his habeas corpus

remedies.[1] The District Court stayed the motion to stay, anticipating this Court's decision in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). App. E. On June 24, 1994, this Court decided *Heck* and ruled habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring a § 1983 action for damages, if judgment for the prisoner would necessarily imply the invalidity of his conviction or sentence.

This Court distinguished its earlier decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974) which held that a prisoner's class action claim for damages was properly before the district court under § 1983 because it required a determination of the validity of procedures employed for imposing sanctions. The *Heck* Court said of *Wolff*:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370.

---

[1]Prior to *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994), the Ninth Circuit stayed prisoner challenges to disciplinary proceedings involving lost good time pending the prisoner's exhaustion of habeas corpus remedies. *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990).

As a result of this decision, the Petitioners filed a motion to dismiss Mr. Balisok's complaint.[2] In support of his response, Mr. Balisok filed an amended complaint in which he abandoned the request for good-time credits. App. I. The amended complaint sought relief in the form of a declaration that the procedures employed violated his right to due process, an injunction to prevent future violations, and compensatory and punitive damages for the "harm sustained from the use of unconstitutional procedures." App. I-9 to I-10. Mr. Balisok omitted any reference to facts indicating that he had suffered harm as a result of the alleged unconstitutional procedures employed by Petitioners Edwards and Wood. At the same time, Mr. Balisok explicitly reserved the right to challenge the loss of good-time credits at another time. App. F-4.

On February 6, 1995, the District Court stayed proceedings and certified the *Balisok* case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. App. F-15. Even though Mr. Balisok dropped his claim for good-time credits, the district court concluded that his "due process claim is a challenge to his conviction of an offense at the disciplinary proceeding, which would affect the length of his

---

[2]For the purpose of this motion Petitioners assumed that Mr. Balisok had a liberty interest in the good-time credits. Accordingly, that question is not raised in this case. However, it is raised in a companion petition for a writ of certiorari in *Wood v. Gotcher* which will be filed on February 26, 1996.

sentence." App. F-12. The district court reasoned that if "the disciplinary hearing at issue did violate [Mr. Balisok's] due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

Despite this conclusion, the district court did not dismiss Mr. Balisok's action. Instead, it followed *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990) which held that such damage claims should be stayed pending exhaustion of the prisoner's remedies in state court.

The Ninth Circuit granted both parties' requests to appeal. On November 22, 1995, the Ninth Circuit summarily reversed and remanded, citing its recent decision in *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).[3] App. A. *Gotcher* also involved a claim that prison disciplinary procedure which resulted in the loss of good-time credits violated the Due Process Clause. The Ninth Circuit held that Mr. Gotcher did not have to exhaust his state and federal habeas corpus remedies because he was challenging disciplinary procedures. The court relied on discussion of *Wolff* in *Heck* stating:

---

[3]The state defendants in *Gotcher v. Wood* intend to seek review of this decision. A companion petition for a writ of certiorari will be filed in *Wood v. Gotcher* on February 26, 1996. The Ninth Circuit's opinions in *Gotcher* is included as Appendix M.

> Gotcher's good conduct time credit claim is similar to the claim in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the *procedure* by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits). . . . Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by *Heck*.

66 F.3d at 1099, App. M-7.

The Ninth Circuit focused exclusively on the relief sought in Mr. Balisok's amended complaint. It did not analyze Mr. Balisok's claims to determine if they would call into question his loss of good-time credits. Instead, the court simply assumed that a prison disciplinary procedure that violated the Due Process Clause would never call into question the denial of good-time credits.

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important Question Left Unresolved in *Heck v. Humphrey*.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this Court held that habeas corpus which includes the requirement to exhaust state remedies is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement even though such a claim may come within the literal terms of 42 U.S.C. § 1983. Left unresolved was whether a prisoner

could bring a § 1983 action for monetary damages instead of an action for immediate or speedier release. In *Heck* the Court addressed this question and ruled that a prisoner may not bring a § 1983 action for damages if a judgment in the prisoner's favor would "necessarily imply the invalidity of his conviction or sentence". 114 S.Ct. at 2372. A § 1983 brought by a prisoner is only proper if

> the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff[.]

Id.

The question left unresolved in *Heck* is whether this rule also applies to due process challenges to prison disciplinary procedures. *Heck* concerned a challenge to the prisoner's conviction rather that prison disciplinary procedures. Nevertheless, *Heck* discussed procedural challenges in its discussion of *Wolff* stating:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370.

Based on this language in *Heck* the Ninth Circuit ruled that Mr. Balisok's § 1983 action was proper simply because it was a challenge to procedure. The court did not determine whether Mr. Balisok's action, if successful, would not demonstrate the invalidity of his loss of good time. App. A-2. Instead the Ninth Circuit simply assumed that any challenge to prison disciplinary procedure would not call into question the loss of Mr. Balisok's good-time credits. This assumption is incorrect. Constitutional defects in prison disciplinary procedures do result in the invalidity of disciplinary sanctions.

In Washington, the appellate courts have exercised their power to reverse the decision and sanctions of disciplinary hearing officers and order new hearings when the courts determined that the procedures followed by prison officials did not pass constitutional muster. See, e.g., *In re Reismiller*, 101 Wn.2d 291, 298, 678 P.2d 323 (1984)("Thus, the committee's finding is reversed and the cause remanded with directions that the superintendent grant a new disciplinary proceeding consistent with the requirements of this opinion."); *In re Hunter*, 43 Wn. App. 174, 177, 715 P.2d 1146 (1986)("But even lofty goals cannot excuse the entire lack of due process and the arbitrary manner in which these hearings were conducted with the resultant punishments. The findings and sanctions imposed against each petitioner must be set aside."). *See also Shea v.*

Edwards, 221 Ill. App. 3d 219, 581 N.E.2d 822, 823, 163 Ill. Dec. 668 (Ill. App. 1991); *Coleman v. Coombe*, 65 N.Y.2d 777, 482 N.E.2d 562, 492 N.Y.S.2d 944 (N.Y. 1985).

In this case Mr. Balisok claims that he was denied the opportunity to present exculpatory evidence in his defense. If this claim were true it would be necessary to invalidate his loss of good-time credits. Both Mr. Balisok and the district court recognized this result. Mr. Balisok's original complaint sought restoration of his good-time credits. The district court stated: "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

It is very important for the court to decide whether the rule laid down in *Heck* applies to challenges to prison disciplinary procedures. The Ninth Circuit has essentially adopted a *per se* rule that any challenge to prison disciplinary procedures is proper under § 1983, regardless of whether it demonstrates the invalidity of disciplinary sanctions such as the loss of good-time credits.

The Ninth Circuit's interpretation creates a substantial loophole in the *Heck* rule. This case is a perfect example. Mr. Balisok initially sought restoration of his good-time credits. After *Heck* was decided, he simply dropped that claim in an

amended complaint, although he specifically reserved the right to renew that claim at a later date. App. I. Thus, if Mr. Balisok's § 1983 action is successful, he can use that decision to restore his good-time credits.

B. There is a Continuing Conflict Between *Preiser v. Rodriguez* and *Wolff v. McDonnell*.

Conflict and confusion continue in the federal courts about how to handle § 1983 actions challenging prison disciplinary procedures and the *Heck*'s discussion of *Wolff* has done nothing to resolve this conflict and confusion. The tension between this Court's decisions in *Preiser* and *Wolff* is the source of this conflict and confusion. In *Preiser*, the Court ruled that habeas corpus is the exclusive remedy for a state prisoner to challenge the fact or duration of confinement. The Court emphasized that the exhaustion requirement in federal habeas actions is rooted in important considerations of federal-state comity that were found to be fundamental by this Court long before Congress codified it in 1948. 411 U.S. at 490-491; *Ex parte Royall*, 117 U.S. 241, 251 (1886). The exhaustion requirement is particularly important in cases where a prisoner challenges a prison disciplinary proceeding. 411 U.S. at 492.

Preiser also established the principle that prisoners must not be allowed to manipulate their pleadings in an effort to deprive the states of their "first opportunity to correct the errors

made in the internal administration of their prisons." *Id.*, at 492. Mindful of the incentive for prisoners to attempt to circumvent the exhaustion requirement, *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleadings."[4] *Id.*, at 489-90.

Shortly after *Preiser*, this Court decided *Wolff*, which involved prisoners in a class action seeking both injunctive relief and monetary damages pursuant to § 1983. 418 U.S. at 554. The class of prisoners challenged the constitutionality of an undisputed set of procedural regulations governing inmate discipline including loss of good-time credits, not the procedures applied in a specific disciplinary proceeding.

The threshold question in *Wolff* was whether, under *Preiser*, the validity of the procedures for depriving prisoners of good-time credits could be considered. In resolving this question, the Court relied on *dicta* in *Preiser*, and held that the plaintiffs in the class action could challenge the prison's

[4]This concern was also noted by the Second Circuit before review was granted. In *Rodriguez v. McGinnis*, 451 F.2d 730, 731 (2d Cir. 1971), the court recognized that "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of the [habeas corpus statute]." *See also Rodriguez v. McGinnis*, 456 F.2d 79, 84 (2d Cir. 1972) (en banc) (Mansfield, J., concurring) ("state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes".).

established procedures for revoking good-time credits in their § 1983 action. *Wolff* stated:

> [A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*, and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

418 U.S. at 555.

Heck did not resolve the tension between *Preiser* and *Wolff*. *Heck* rejected the dicta in *Preiser* relied on by *Wolff* as "an unreliable, if not an unintelligible, guide". 114 S.Ct. at 2370. However, in one respect, the Court seemed to endorse the result in *Wolff* stating:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Id. On the other hand, a *per se* rule that challenges to prison disciplinary procedures can be brought pursuant to § 1983 is totally inconsistent with the Court's reasoning in *Heck*. Thus, the question remains: Can a prisoner bring a challenge to the prison disciplinary procedures that result in the loss of good-time

credits under § 1983 regardless of whether it demonstrates the invalidity of disciplinary sanctions such as loss of good-time credits?

The issue has caused substantial conflict and confusion in the federal courts. In *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992), Judge Easterbrook described the problem:

> Ever since *Preiser* and *Wolff*, we have struggled with the distinction between § 2254 and 42 U.S.C. § 1983. .... Since *[Wolff]* it has been difficult to know how to classify suits that purport to be about procedures and conditions of confinement, but that logically entail a shorter duration of confinement if the prisoner wins. This circuit's leading cases ... are not entirely harmonious, among themselves or with decisions in other circuits. Both sides ask us to tidy up, although they disagree about which cases we should overrule and which extend. As the source of the problem lies elsewhere, in the tension between *Preiser* and *Wolff* rather than in our failure to tread a path already blazed, we doubt that more words would bring greater clarity.

(Emphasis added, citations omitted). The Fifth Circuit has also cited to the tension between *Preiser* and *Wolff* as a cause of "struggle" among the circuits:

> The Supreme Court cases do not, therefore, make it easy to separate claims that challenge the "fact or duration" of confinement and claims that challenge procedures having some effect on release decisions. ... Defining the precise contours of the boundaries between *Preiser* and *Wolff* consequently has proved to be an elusive goal. Without additional guidance from the Supreme Court, the circuit courts have

> struggled to establish clear standards for determining how the rules set forth by *Preiser* and *Wolff* should be applied to § 1983 claims that would, through the effects of res judicata and collateral estoppel, call directly into question the constitutionality of state court or administrative decisions affecting release decisions even though the plaintiff does not explicitly seek release from custody.

Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1116 (5th Cir. 1987) (emphasis added). *See also* Schwartz, The *Preiser* Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85-88, 118, 121-25 (1988) (emphasis supplied).[5]

C. There is a Conflict Among the Federal Circuits.

In this case, the Ninth Circuit concluded that a prisoner's challenge to a specific disciplinary hearing will never "call into question" the resulting loss of good time as long as the prisoner indicates that he is only challenging the procedures, and not the

---

[5]This Court has recognized the appropriateness of certiorari to revisit a precedent that has become "a source of controversy and confusion" *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967), or "the subject of continuing controversy and confusion," and where "federal courts confronted with analogous [facts] have sought to limit its reach." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-48 (1977). Similarly, certiorari was appropriate in *Parratt v. Taylor*, 451 U.S. 527, 533 (1981) where the Court noted that two prior decisions "have not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one".

result, of the hearing. App. A-2. In reaching this conclusion, the Ninth Circuit looks solely to the relief sought in the prisoner's complaint. Under this approach, it is irrelevant that the prisoner sought lost good-time credits in his original complaint, App. H-28, H-32 to H-33, or that the prisoner expressly reserved the right to challenge the lost good-time credits in state court after the federal court rules that this was a deprivation without due process. App. F-4.

This approach directly conflicts with that taken by Fifth and Eighth Circuits.[6] *Serio*, 821 F.2d 1112 ; *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987); *see Armento-Bey v. Harper*, 68 F.3d 215, 216 (8th Cir. 1995) (Bowman, dissenting). Under the analysis of these cases, Mr. Balisok's challenge to the prison disciplinary proceedings would have been dismissed or stayed pending his exhaustion of state court remedies.

In *Serio*, the Fifth Circuit reviewed a prisoner's § 1983 claim against members of the Louisiana State Board of Pardons. Although the case dealt with parole procedures, Serio's claim was notably similar to Mr. Balisok's claim. Serio alleged that

---

[6]This issue has also led to a considerable divisiveness within the circuits. *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992); *Armento-Bey v. Harper*, 68 F.3d 215, 216 (8th Cir. 1995)(Judge Bowman, who authored *Offet*, dissents to a per curiam decision joined by Judge Arnold, who had dissented in Offet); *Gwin v. Snow*, 870 F.2d 616, 623, 626-27 (11th Cir. 1989) (the court reluctantly accepts a rule "despite its conflict with Supreme Court precedent"). Compare *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990) with *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).

the Board denied his parole, at least in part, because of his litigiousness, and Serio sought a declaratory judgment and order enjoining Board members from repeating the practice in the future. 821 F.2d at 1113. Much like Mr. Balisok, Serio attempted to avoid exhaustion of habeas corpus remedies by insisting that he sought neither a reduction in his sentence nor early release. *Id.*, at 1115.

The Fifth Circuit reviewed *Preiser* and *Wolff* to determine whether Serio's claims had to first be pursued through habeas corpus with its attendant exhaustion requirement. Despite Serio's characterization of his claims as "procedural", the court required him to exhaust his remedies. The court held that a prisoner must exhaust his state habeas remedies before bringing a § 1983 claim that his or her hearing was constitutionally defective. *Id.*, at 1118. The court said it would even apply this rule to cases where the prisoner brings a "broad-based attack", when that attack may, in effect, automatically entitle the specific claimant to an earlier release. *Id.*, at 1119.

In *Offet*, the Eighth Circuit reviewed a prisoner's challenge to rules governing good-time credits. In addition to other relief, Offet sought punitive damages and an injunction prohibiting the prison from withholding future good-time credits under the rules.

In contrast to Mr. Balisok's case, the Eighth Circuit required Offet to exhaust his state court remedies.

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us no answer to the concerns of federalism that cases such as this one raise.

823 F.2d at 1259 (citations omitted). The court found it "clear that the question whether exhaustion should be required should not be determined solely by reference to the relief the plaintiff requests. Such a facile distinction between habeas and other claims quickly would subvert the policy announced in Preiser", and would deprive the state court system of its first opportunity to address the merits of the underlying constitutional issue. *Id.*, at 1258 (citations omitted).

The Ninth Circuit's decision also appears to conflict with the D.C. and Fourth Circuits. In *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994), the D.C. Circuit required exhaustion of the prisoners' due process challenge to the replacement of a treatment program under which they were entitled to good-time credits. In *Leonard v. Hammond*, 804 F.2d 838, 839 (4th Cir. 1986), the Fourth Circuit required exhaustion in a case where plaintiffs sought to enjoin the future imprisonment (for civil contempt) of indigents who are not first appointed counsel.

Other circuits take a narrower view, focusing solely on the relief sought by the prisoner. *See Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir. 1989) (rejecting the Eighth Circuit's approach in *Offet*); *Gwin v. Snow*, 870 F.2d 616, 625-26 (11th Cir. 1989) (refusing to adopt the bright-line rule set forth in *Serio*). These circuits will allow a § 1983 claim to proceed as long as the prisoner claims he is only seeking relief from the procedures, as opposed to the result, of the allegedly unconstitutional hearing.

The federal courts' longstanding conflict and confusion with respect to jurisdiction under § 1983 of challenges to prison disciplinary procedures, which was not resolved in *Heck*, presents a significant question that requires resolution by this Court.

D. This Case is Important Because it Concerns a Source of Frequent Litigation that Involves a Substantial State Interest.

This Court has recognized its review is needed when the case involves jurisdictional questions that are frequently subject to litigation in the federal courts. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate". *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion); *see also Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818-19 (1988). Prison disciplinary cases are frequently subject to litigation because they

lie "at the intersection of the two most fertile sources of federal-court prisoner litigation--the Civil Rights Act of 1871, Rev.Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254", *Heck*, 114 S. Ct., at 2369, and this intersection is frequently inhabited by numerous *pro se* litigants. *Pro se* litigants may: (1) lack the sophistication to recognize that their claim for good-time credits has been mispled as a civil rights challenge to procedures, or (2) possess the sophistication to draft pleadings designed to circumvent the exhaustion requirement. *See* Schwartz, 37 DePaul L. Rev. at 125-26.

Preiser recognizes that the states have an important interest in initially resolving constitutional claims. If a state prisoner could secure § 1983 review of prison disciplinary procedures that led to an extension of the prisoner's confinement by simply seeking injunctive and declaratory relief, this Court's explicit mandate that state prisoners must exhaust their state court remedies would be rendered meaningless.

This result places form before substance, and potentially frustrates the state's ability to remedy a deprivation of liberty through its own mechanisms for prompt resolutions of such claims. See Washington Rules of Appellate Procedure 16.9 and 16.11 (the State must respond to a claim of unlawful restraint

within 20 days and the Chief Judge must consider the claim promptly).

If the Ninth Circuit's interpretation is correct, then a litigant could get a federal ruling on the merits of an action which affects his release date, along with damages, a prospective injunction, or a declaratory judgment. *See Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976) *adhered to en banc*, 550 F.2d 342 (5th Cir. 1977). The litigant could then go back into state court armed with the federal court judgment and demand the restoration of lost good time, a rescinded parole date, or other determinations directly affecting his confinement, claiming res judicata or collateral estoppel, or both. A federal court ruling could directly lead to a reversal of the prison disciplinary finding and sanction -- a result that is inconsistent with this Court's ruling in *Preiser*.

Because of the substantial state interests at stake in an area frequently litigated, this Court should definitively decide the issue.

VI. CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Talis Merle Abolins
John Scott Blonien*
William Berggren Collins
Mary E. Fairhurst
Assistant Attorneys General
Counsel of Record*
Counsel for Petitioners

P.O. Box 40116
Olympia, Washington 98504-0116
(360) 586-1445

February 1996

[FILED]
[November 22, 1995]

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 95-35307
95-35310

D.C. No. CV-93-00416-JLQ

MEMORANDUM*

JERRY B. BALISOK,
Plaintiff-Appellant,
Cross-Appellee,

v.

GARY P. EDWARDS; TANA WOOD,
Defendants-Appellees-
Cross-Appellants,

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Submitted November 20, 1995**

Filed November 22, 1995

Before: PREGERSON, NORRIS and REINHARDT, Circuit Judges.

Washington state prisoner Jerry B. Balisok appeals and Washington state prison officials Gary Edwards and Tana Wood cross-appeal the district court's order staying Balisok's 42 U.S.C. § 1983 action. We reverse and remand.

These appeals are governed by our recent decision in Gotcher v. Wood, No. 94-35484, slip op. 12881 (9th Cir. Oct. 4, 1995), in which we held that an inmate's challenge to the procedure by which he was denied good-time credits did not call into question the lawfulness of his continuing confinement and was not barred by Heck v. Humphrey, 114 S. Ct. 2364 (1994). Because Balisok's due process challenges to prison disciplinary procedures were not barred by Heck, see Gotcher, slip op. at 12885-86, we reverse the district court's order staying Balisok's section 1983 action and remand for further proceedings.

REVERSED AND REMANDED.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[FILED]
[January 26, 1994]

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER TO PROCEED *IN FORMA PAUPERIS*, ORDER DISMISSING ONE ALLEGATION AND ORDER OF SERVICE

JERRY B. BALISOK,

Plaintiff,

v.

GARY EDWARDS and TANA WOOD,

Defendants.

Plaintiff, a prisoner at the Washington State Penitentiary, Walla Walla, Washington, seeks to file *in forma pauperis* a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. Because it appears Plaintiff lacks sufficient funds to prosecute this action,

IT IS HEREBY ORDERED that the Clerk shall file the complaint without payment of the filing fee.

PLAINTIFF'S ALLEGATIONS

Mr. Balisok claims the Defendants violated his due process rights because his witness' statements were not admitted at his infraction hearing, it was not noted on the record why

witnesses were not called or statements given, he was denied a staff advisor and Defendant Edwards failed to specify in his reasons for finding Plaintiff guilty which reports and what documents he relied on to make the finding. The Plaintiff alleges he requested witness statements from several inmates and an instructor with the community college. He maintains that some of them were not given statements to fill out, and others wrote statements but Defendant Edwards either denied their existence or refused to consider them.

The Plaintiff also alleges he requested a staff advisor because he is allegedly suffering from sensory deprivation psychosis from being in IMU, but Defendant Edwards denied Plaintiff's request. Mr. Balisok asserts he has a liberty interest in having an advisor created by WAC 137-28-097[1] which provides for staff advisors for inmates meeting certain requirements. Plaintiff reports he was found guilty of four major infractions and was sanctioned with ten days isolation, 20 days in segregation, and the loss of 30 days of good-time credits. He alleges he appealed the finding and sanctions, but his appeal was

[1]**WAC 137-28-097. Staff advisors** (1) An inmate *may* have a staff advisor appointed by the hearing officer to prepare for a hearing. The hearing officer shall consider such factors as the literacy, the complexity of the issue and the inmate's overall ability to speak for himself/herself and adequately present his/her case, prior to assigning a staff advisor. *The assignment of a staff advisor will only be necessary when considering such factors, and should not be construed to mean that a staff advisor must be assigned.* . . . **WAC 137-28-097(1) (1984) (emphasis added).**

not acted upon and was returned for being too long. Plaintiff asserts he refiled his appeal insisting it should be accepted because the two page limit was not mandatory. He claims his resubmitted appeal was not considered by Defendant Wood. Plaintiff prays for declaratory and injunctive relief, and for compensatory and punitive damages.

DISCIPLINARY HEARING DUE PROCESS

The Supreme Court has enumerated the rights to which inmates of state prisons are entitled in disciplinary proceedings as a matter of procedural due process under the Fourteenth Amendment. Where the prisoner is charged with serious misconduct and is penalized with the loss of "good-time" credits or with punitive segregation, the prisoner's rights include (1) advance written notice of the charges against him or her, (2) an opportunity to call witnesses and present documentary evidence, provided that to do so will not jeopardize institutional safety or correctional goals, and (3) a written statement by the factfinder of the evidence relied upon and reasons for the disciplinary action taken. *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1976).

The findings of a prison disciplinary board which result in the loss of a protected liberty interest must be supported by "some evidence on the record." *Superintendent v. Hill*, 472 U.S. 445, 454 (1985), *Bostic v. Carlson*, 884 F.2d 1267, 1269-70 (9th Cir. 1989). Under the *Hill* analysis the court determines

"whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455-56. The record must not be "so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Id.* at 457. This court, however, is not to make its own assessment of the credibility of witnesses or reweigh the evidence. *Id.* at 455.

Among the due process rights afforded prisoners at disciplinary hearings is the right to call witnesses and present evidence unless granting the request would be "unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). The right to call witnesses is subject to the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution . . . ." *Baxter v. Palmigiano*, 425 U.S. 308, 321 (1976). "[P]rison officials maybe required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but that they may do so either by making the explanation a part of the 'administrative record' in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a 'liberty' interest is challenged because of that claimed defect in the hearing." *Ponte v. Real*, 471 U.S. 491, 497 (1985).

The Plaintiff claims he was denied the right to call several of his witnesses and that it was not noted on the record

why his witnesses were not called or given statements. Regarding the denial/refusal to call witnesses without explanation on the record, Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

LIBERTY INTERESTS

Liberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

> State law establishes a liberty interest if it places substantive limitations on the exercise of official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). The limitations must contain mandatory language requiring specific, substantive predicates. *See Hewitt*, 459 U.S. at 471. (State statute combining mandatory words such as "shall," "will," or "must" with substantive predicates creates protected liberty interest). In essence, "a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates." *Toussaint [v. McCarthy]*, 801 F.2d [1080] at 1094 [(9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)].

Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993).

Regarding Plaintiff's other due process allegations, the Constitution does not guarantee the right to appeal the result of an infraction hearing, *Wolff*, 418 U.S. at 564-66. Mr. Balisok argues that he has a state created liberty interest in the appeals process created by WAC 137-28-115. The State of Washington

provides for an infraction hearing appeal process, and the regulation outlining the process arguably creates a liberty interest for the inmate in having his appeal heard. WAC 137-28-115.[2] Thus, Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

In addition, the Constitution requires that the inmate receive a written statement from the factfinder of the evidence relied upon and reasons for the disciplinary action taken. *Wolff*, at 564-66. According to Plaintiff's pleading, Defendant Edwards' written summary of his reasons stated "Written rpt and testimony, documents provided." (Civ. Rts. Compl. at 11.) Plaintiff argues that given the volume of documents involved in his infraction, Defendant Edwards' written summary did not sufficiently point out the evidence relied upon for the disciplinary action taken. Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

The Constitution does not guarantee that an inmate will be provided with a staff advisor. Plaintiff has not shown that he necessarily qualified for a staff advisor. In any case, however,

---

[2]**WAC 137-28-115. Appeal to superintendent** (1) An inmate *may* appeal the decision of the hearing officer to the superintendent by filing a written request for review and his/her reasons therefor with the clerk within twenty-four hours, exclusive of weekends and holidays, after receiving written notice of the decision of the hearing officer. The superintendent may, in his/her discretion, consider appeals filed beyond the twenty-four hour period. WAC 137-28-115(1) (1984) (emphasis added).

WAC provision that allows staff divisors (WAC 137-28-097, see note 1) to be appointed for inmates in need of them does not create a liberty interest for Plaintiff to have one appointed for him (language discretionary not mandatory). Therefore, Plaintiff's due process rights were not violated when a staff advisor was not appointed for him.

DISMISSAL BASED ON 28 U.S.C. § 1915(d)

Plaintiff is proceeding in this action *in forma pauperis* under 28 U.S.C. § 1915(d). *Sua sponte* dismissal of this action prior to service of process is justified only if, under section 1915(d), the complaint is frivolous. *Jackson v. State of Arizona*, 885 F.2d 639 (9th Cir. 1989). A complaint is frivolous within the meaning of section 1915(d) only if it lacks an arguable basis in law or fact. *Id*. This court may dismiss *in forma pauperis* claims which are "based on indisputable meritless legal theories" or whose "factual contentions are clearly baseless." *Id*. (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (such as "claims against which it is clear that the defendants are immune from suit. . .")). also, this court may dismiss "claims of infringement of a legal interest which clearly does not exist." *Id*.

Plaintiff's allegations of due process violations for failure to provide Plaintiff with a staff advisor has no basis in fact. Mr. Balisok has no liberty interest in being appointed a staff advisor to help him through the process. Therefore, Plaintiff's

allegations of a due process violation for failure to appoint a staff advisor has no basis in law or fact. Accordingly,

IT IS ORDERED that Plaintiff's due process allegation regarding Plaintiff's not being provided with a staff advisor is **DISMISSED WITH PREJUDICE.** In addition, because Plaintiff has dropped his allegations against Superintendent Tana Wood, Plaintiff's allegations against Tana Wood are **DISMISSED WITH PREJUDICE.** Regarding the remainder of Plaintiff's due process allegations,

IT IS ORDERED:

1. The United States Marshal, in compliance with Fed. R. Civ. P. 4(c) (2) (c) (ii), shall serve, by First Class Mail, a Notice of Lawsuit and Request for Waiver of Service for Summons and the Complaint and Order Granting Leave to Proceed In Forma Pauperis, upon the above-named Defendants, together with two copies of the Waiver of Service and a return envelope, postage prepaid, addressed to the sender.

2. The clerk shall mail a copy of the complaint to the Attorney General for the State of Washington.

3. Defendants shall file an answer or otherwise respond to the Complaint within forty-five (45) days after service. Failure to so respond may result in entry of a default judgment, pursuant to LR 55.

4. Plaintiff shall serve upon Defendants, or if appearance has been entered by counsel, upon their attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the Defendants or to their counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court. Plaintiff is also advised that throughout this action he must notify the Clerk of the Court regarding any change of address and phone number (at least a message phone). Failure to do so might result in the dismissal of the action if the Court is unable to contact Plaintiff.

IT IS FURTHER ORDERED, that a telephonic scheduling conference between the court, Plaintiff and counsel for Defendants will be held on **April 4, 1994 at 3:00 p.m.** The court will initiate the call. On or before March 28, 1994, officials at the Washington State Penitentiary shall furnish the court with the telephone number at which the court can reach Plaintiff at the time and date of the conference.

On or before March 28, 1994, Plaintiff and counsel for Defendants shall file and serve written status reports with respect to the parties' positions concerning:

1. Service of process on parties not yet served;

2. Jurisdiction and venue;

3. Anticipated motions;

4. Anticipated and remaining discovery, including limitations on discovery.

5. Further proceedings, including setting dates for discovery cutoff, pretrial and trial;

6. Appropriateness of special procedures such as consolidation of actions for discovery or pretrial, reference to a master or magistrate or to arbitration;

7. Modification of the standard pretrial procedure due to the relative simplicity or complexity of the action or proceeding;

8. Anticipated trial time required - if reasonable evaluation is practical;

9. Feasibility of bifurcation or otherwise structuring sequence of the trial;

10. Prospects for settlement;

11. Any other matters that may be conducive to the just, efficient and economical determination of the action or proceeding, including the definition or limitation of issues.

12. In his report, Plaintiff shall list the name, address and expected testimony from each witness he desires the court to subpoena to testify at the trial of this matter.

Plaintiff and counsel for Defendants shall also advise the Clerk whether all parties will consent to trial of this case by a Magistrate Judge and whether, in the event of an appeal, the

appeal will be taken to the Ninth Circuit Court of Appeals. 28 U.S.C. § 636. In the absence of consent by all parties, disclosure as to which consented and which did not will be made only to the clerk.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to Plaintiff and to counsel for Defendants.

DATED this 25th day of January, 1994.

JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[March 8, 1994]

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND ORDER OF SERVICE

JERRY B. BALISOK,

Plaintiff,

v.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Plaintiff's Motion to Clarify (Ct. Rec. 3) which this Court will construe as a Motion for Reconsideration. The motion was considered on February 28, 1994 without oral argument. Plaintiff is proceeding *pro se*, and Defendants have not yet filed an answer in this matter. The Court has reviewed the record and is fully advised in this mater, and **IT IS HEREBY ORDERED** that Plaintiff's Motion for Reconsideration is **GRANTED.** The Court will reconsider and reinstate Plaintiff's allegations against Defendant Tana Wood.

PLAINTIFF'S ALLEGATIONS

In his complaint, Mr. Balisok claimed the Defendants violated his due process rights because his witness' statements were not admitted at his infraction hearing, it was not noted on the record why witnesses were not called or statements given, he was denied a staff advisor and Defendant Edwards failed to specify in his reasons for finding Plaintiff guilty which reports and what documents he relied on to make the finding. The Plaintiff alleges he requested witness statements from several inmates and an instructor with the community college. He maintains that some of them were not given statements to fill out, and others wrote statements but Defendant Edwards either denied their existence or refused to consider them.

The Plaintiff also alleges he requested a staff advisor to be present at his hearing, but this allegation was dismissed by this Court's initial order and Plaintiff has not contested that ruling. Plaintiff reports he was found guilty of four major infractions and was sanctioned with ten days isolation, 20 days in segregation, and the loss of 30 days of good-time credits. He alleges he appealed the finding and sanctions, but his appeal was not acted upon and was returned for being too long. Plaintiff asserts he refiled his appeal insisting it should be accepted because the two page limit was not mandatory. He claims his resubmitted appeal was not considered by Defendant Wood.

Plaintiff prays for declaratory and injunctive relief, and for compensatory and punitive damages.

As stated in the Court's initial order, the Constitution does not guarantee the right to appeal the result of an infraction hearing, *Wolff*, 418 U.S. at 564-66. Mr. Balisok argues that he has a state created liberty interest in the appeals process created by WAC 137-28-115. The State of Washington provides for an infraction hearing appeal process, and the regulation outlining the process arguably creates a liberty interest for the inmate in having his appeal heard. WAC 137-28-115.[1] Plaintiff alleges that Defendant Wood responded to his appeal in a memorandum on October 19, 1993 and refused to overturn the sanctions in spite of the due process violations during his infraction hearings. The Plaintiff has not dropped his allegation against Defendant Wood. Accordingly,

IT IS ORDERED:

1. The United States Marshal, in compliance with Fed. R. Civ. P. 4(c) (2) (c) (ii), shall serve, by First Class Mail, a Notice of Lawsuit and Request for Waiver of Service for

---

[1]**WAC 137-28-115. Appeal to superintendent** (1) An inmate *may* appeal the decision of the hearing officer to the superintendent by filing a written request for review and his/her reasons therefor with the clerk within twenty-four hours, exclusive of weekends and holidays, after receiving written notice of the decision of the hearing officer. The superintendent may, in his/her discretion, consider appeals filed beyond the twenty-four hour period. WAC 137-28-115(1) (1984) (emphasis added).

Summons and the Complaint and Order Granting Leave to Proceed In Forma Pauperis, upon Defendant Wood, together with two copies of the Waiver of Service and a return envelope, postage prepaid, addressed to the sender.

2. The clerk shall mail a copy of the complaint to the Attorney General for the State of Washington.

3. Defendant Wood shall file an answer or otherwise respond to the Complaint within forty-five (45) days after service. Failure to so respond may result in entry of a default judgment, pursuant to LR 55.

4. Plaintiff shall serve upon Defendant Wood, or if appearance has been entered by counsel, upon her attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the Defendant or to her counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

IT IS FURTHER ORDERED, that a telephonic scheduling conference between the court, Plaintiff and counsel for Defendants has already been scheduled for **April 4, 1994 at 3:00 p.m.** The court will initiate the call. On or before March

28, 1994, officials at the Washington State Penitentiary shall furnish the court with the telephone number at which the court can reach Plaintiff at the time and date of the conference.

On or before March 28, 1994, Plaintiff and counsel for Defendants shall file and serve written status reports with respect to the parties' positions concerning:

1. Service of process on parties not yet served;
2. Jurisdiction and venue;
3. Anticipated motions;
4. Anticipated and remaining discovery, including limitations on discovery.
5. Further proceedings, including setting dates for discovery cutoff, pretrial and trial;
6. Appropriateness of special procedures such as consolidation of actions for discovery or pretrial, reference to a master or magistrate or to arbitration;
7. Modification of the standard pretrial procedure due to the relative simplicity or complexity of the action or proceeding;
8. Anticipated trial time required - if reasonable evaluation is practical;
9. Feasibility of bifurcation or otherwise structuring sequence of the trial;
10. Prospects for settlement;
11. Any other matters that may be conducive to the just, efficient and economical determination of the action or proceeding, including the definition or limitation of issues.

12. In his report, Plaintiff shall list the name, address and expected testimony from each witness he desires the court to subpoena to testify at the trial of this matter.

Plaintiff and counsel for Defendants shall also advise the Clerk whether all parties will consent to trial of this case by a Magistrate Judge and whether, in the event of an appeal, the appeal will be taken to the Ninth Circuit Court of Appeals. 28 U.S.C. § 636. In the absence of consent by all parties, disclosure as to which consented and which did not will be made only to the clerk.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to Plaintiff and to counsel for Defendant.

DATED this 4th day of March, 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH

[FILED]
[April 11, 1994]

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

SCHEDULING ORDER

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

A telephonic status conference was held in the above-entitled matter on April 4, 1994. Jerry B. Balisok appeared *pro se*; Talis Abolins and Tracey Hawk appeared on behalf of Defendants.

IT IS HEREBY ORDERED:

1. Defendants shall file and serve their final witness list on or before April 20, 1994.

The list shall contain the name, address and a summary of each witness's testimony. The list shall not be supplemented, except for rebuttal, without leave of court to prevent manifest

injustice. The party and/or attorney listing a witness who is not called to testify shall pay the discovery costs, including attorney fees, subject to review by the court to prevent a manifest injustice.

2. All discovery shall be completed on or before June 28, 1994.

3. All dispositive motions shall be filed and served on or before July 7, 1994.

4. THE PARTIES SHALL FILE NO FURTHER DISCOVERY EXCEPT THOSE PORTIONS NECESSARY TO SUPPORT MOTIONS.

5. THERE SHALL BE NO FURTHER JOINDER OF PARTIES.

6. The pretrial conference will be held in Spokane, Washington, at 2:30 p.m., on September 9, 1994. If an agreed Pretrial Order has been lodged, counsel need not appear at that time unless there are unresolved motions or objections to be heard.

7. Trial briefs, requested voir dire and proposed jury instructions shall be filed and served on or before September 19, 1994.

8. The jury trial shall commence at 9:00 a.m., on September 26, 1994, in Spokane, Washington.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of April 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[April 22, 1994]

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER STAYING DEFENDANTS' MOTION TO STAY

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Defendants' Motion for Stay of Proceedings, (Ct. Rec. 12), heard without oral argument on April 20, 1994. Plaintiff appeared *pro se*; Defendants were represented by Talis Abolins. Having reviewed the record and being fully informed in the matter, the court rules as follows.

This matter presents an important question to the court. However, the Supreme Court recently heard argument on a similar issue in the case of Heck v. Humphrey, 62 U.S.L.W. 3481, reviewing 997 F.2d 355 (7th Cir. 1993). The Court's

decision in Heck will potentially impact the Ninth Circuit's opinion in Young v. Kenny, 907 F.2d 874 (9th Cir. 1989). Accordingly, this court shall stay the hearing on Defendants' Motion for Stay, (Ct. Rec. 12), until the issuance of the Supreme Court's decision in Heck.

IT IS HEREBY ORDERED:

1. Defendants' Motion for Stay of Proceedings, (Ct. Rec. 12), **SHALL BE STAYED.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 20th day of April 1994.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
Chief United States District Judge

[FILED]
[February 6, 1995]

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND STAYING ACTION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

BEFORE THE COURT is Defendants' Motion to Dismiss (Ct. Rec. 33) heard without oral argument on January 11, 1995. Plaintiff was represented by attorney Thomas "Speedy" Rice and intern Kristine Balogh of Gonzaga University Legal Assistance; Defendants appeared through Washington Assistant Attorneys General Talis Abolins and Tracey Hawk. Having reviewed the record and being fully advised in this matter, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED** for the following reasons.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jerry Balisok is an inmate at the Washington State Penitentiary. On August 16, 1993, Mr. Balisok was charged with four prison infractions. In preparation for the infraction hearing, Mr. Balisok requested that Defendant Gary Edwards, the hearing officer, obtain witness statements from various inmates.

At the infraction hearing on September 2, 1993, Mr. Balisok asked that the witness statements be read into the record. According to Plaintiff, Edwards replied that no witness statements had been submitted on his behalf. Mr. Edwards found Mr. Balisok guilty of the charged infractions, and sentenced him to 10 days in isolation and 20 days in segregation, as well as depriving him of 30 days good-time credit toward his sentence.

Mr. Balisok claims that on October 7, 1993, he reviewed his central file, and discovered the witness statements he had wanted read into the record. However, the statements had no "date stamp" indicating the date they were submitted. Plaintiff contends that prison officials purposefully failed to date stamp the witness statements in order to weaken any due process claim he might bring against them for the failure to call his witnesses. According to Mr. Balisok, by not date stamping the statements, prison officials could argue in their defense that the statements

were submitted after the hearing. Balisok claims this is the usual practice when a "jail house attorney" like himself has been infracted. The court can take judicial notice that Mr. Balisok is an inmate who has filed numerous lawsuits in this district, and that he also assists other inmates with their legal actions.

Mr. Balisok appealed Defendant's finding to Defendant Tana Wood, the prison's superintendent. The appeal was rejected because it exceeded a 2-page limit. Plaintiff attempted to resubmit the appeal, but it was again rejected. He then wrote to Superintendent Wood requesting that the infraction appeal be reconsidered. Ms. Wood responded to the letter by affirming the disciplinary finding and the sanctions.

On January 26, 1994, Mr. Balisok filed this civil rights complaint under 42 U.S.C. § 1983 alleging that his disciplinary hearing violated his due process rights. In an amended complaint filed October 28, 1994, Plaintiff narrowed his allegations to a claim for due process violations in the procedures used to impose the disciplinary sanctions against him. Mr. Balisok claims that (1) Defendant Edwards refused to call requested witnesses, produce witness statements, or date stamp witness statements, (2) Defendant Edwards failed to specify what facts and evidence supported the finding of guilt, and (3) Defendants Edwards and Wood failed to specify the facts and evidence that supported the decision to deny Plaintiff's request

to appeal. Thus, Mr. Balisok alleges that he was denied due process at the disciplinary hearing that resulted in his being placed in isolation and segregation, as well as being deprived of good-time credits. Plaintiff seeks declaratory relief that the procedures used violated his constitutional right to due process, injunctive relief to prevent such future violations, and compensatory and punitive damages.

Probably in recognition of state court exhaustion requirements, Mr. Balisok does not specifically seek restoration of his good-time credits in this action. However, he has not waived any future claim for their return should he prevail in this action and, in fact, has expressly reserved the right to make that claim in another forum. It is clear that Mr. Balisok is challenging the very same procedure which resulted in the loss of his good time, and that would be the basis for any future claim for restoration of that good time.

Defendants have moved to dismiss this suit contending that Plaintiff's sole remedy in this court is a federal habeas corpus action, and that Plaintiff has failed to exhaust his state remedies.

DISCUSSION

Generally, when a state prisoner challenges the fact or duration of his confinement and seeks a determination that he is entitled to immediate or speedier release from imprisonment, his

sole federal remedy is a writ of habeas corpus, with its requirement that state remedies must first be exhausted. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1991). Habeas corpus, however, is not the appropriate or even available remedy for damages claims. *Sisk v. Branch*, 974 F.2d 116, 117 (9th Cir. 1992) (citing *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974). Rather, section 1983 authorizes the recovery of money damages for constitutional violations and generally does not require exhaustion of state remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 507 (1982). The exhaustion requirement is a doctrine based on comity, rather than jurisdiction. *Granberry v. Greer*, 481 U.S. 129 (1987). "Federal-state comity is a concern even where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint." *Young v. Kenny*, 907 F.2d 874, 875 (9th Cir. 1989).

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court first looked at the issue of a prisoner's constitutional challenge to the deprivation of good-time credits under 42 U.S.C. § 1983. In that case, the prisoners sought only the restoration of good-time credits allegedly withheld unconstitutionally. The Court held that, because the prisoners were challenging the very fact or duration of their confinement, and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus with its exhaustion requirement.

Id. at 500. The Court reasoned, under a federal-state comity doctrine, that the state courts should have the first opportunity to rule on the constitutionality of state convictions. The Court also noted that the comity doctrine was extremely important in a prison disciplinary proceeding setting. The Court justified its holding because "the respondents here sought no damages but only equitable relief--restoration of their good-time credits--and our holding today is limited to that. . ." *Id.* at 494. The Court then added the following statement as *dicta*:

> If a state prisoner is seeking damages, he is attacking something other than immediate or more speedy release. . . In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, . . . a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies. . .

Id.

That one statement of pure *dicta* has caused federal courts, including the Supreme Court on subsequent occasions a considerable amount of difficulty. One year after the *Preiser* decision, in *Wolff v. McDonnell*, 418 U.S. 539 (1974) the Court dealt with a case where state prisoners were seeking both injunctive relief and monetary damages in a § 1983 action alleging the unconstitutional taking of good-time credits. There, the Court observed that, although *Preiser* foreclosed the claim for the restoration of good-time credits, the instant complaint

also sought damages and cited the *Preiser dicta* stating:

> *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings.

Wolff, at 554 citing *Preiser, supra* at 499 n. 14. Based on the *Preiser dicta*, the Court stated:

> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

Wolff, at 555. Thus, the Court turned *dicta* into law, which suggested that the exclusivity of habeas turns on the type of relief requested by the plaintiff. This has caused lower courts to continue to struggle with damage actions brought under section 1983 regarding the deprivation of good-time credits.

In 1990, the Ninth Circuit addressed the issue in *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990). There, a prisoner filed a complaint for damages claiming the unconstitutional failure on the part of state officials to apply jail time credits to his prison sentence. The court clearly recognized the comity concern, even where damages were the remedy sought:

> Federal-state comity is a concern where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint. Before a district court could award damages to Young, it would have to determine

that his jail time credits were unconstitutionally withheld. Such a ruling would not bar a state from relitigating the issue in a subsequent state habeas proceeding because 'neither a State nor its officials acting in their official capacity are persons under § 1983 when the relief sought is damages. . . . Nevertheless should a federal court find a term of imprisonment unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in 'unnecessary friction between the federal and state court systems." . . . Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement--to give the state courts the first opportunity to rule on the claims of state prisoners--would accordingly be frustrated. As a result, habeas must be the exclusive federal remedy not just when a state prisoner requests the invalidation or reduction of his sentence, but whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long.

Id. at 876. In *Young*, the court noted that "all nine federal circuit courts to consider this question have arrived at the same conclusion." *Id.* However, the court was careful to express that it "share[d] a concern expressed by many of those courts regarding the apparent contradiction with *Wolff*. The Ninth Circuit justified its departure from *Wolff* by citing another *dictum* statement of the Supreme Court in *Tower v. Glover*, 467 U.S. 914 (1984), where the Court stated that "We . . . have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Id.* at 923. The *Young* court concluded:

> Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld would undermine the exhaustion requirement in federal habeas actions and frustrate important values of federal-state comity.

Id. at 878.

Here, like in *Young*, should this court find the disciplinary proceeding resulting in the loss of good time unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in "unnecessary friction between the federal and state court systems." Were the state court then to uphold the validity of the sanction, the prisoner would be entitled to bring a federal habeas action, perhaps in the same district court that had earlier ruled that the proceeding, and thus its sanction, was unlawful. The purpose of the exhaustion requirement--to give the state courts the first opportunity to rule on the claims of state prisoners--would accordingly be frustrated.

Subsequent to *Young*, in *Sisk v. CSO Branch*, 794 F.2d 116 (9th Cir. 1991), prisoners challenged the constitutionality of a prison disciplinary hearing, and sought their return from a high security to medium security unit, damages for being transferred to high security, and restoration of forfeited good-time credits. A different Ninth Circuit panel held that where there was no direct relationship between the challenged proceedings and the

prisoner's release dates, "the speculative and incidental effect of prison disciplinary procedures on the duration of plaintiff's sentence is not sufficient to bring any part of this action within the 'core of habeas corpus.' A federal court need not stay its hand merely because these sanctions were imposed concurrently with a revocation of good time." *Id*. at 118. Although the *Sisk* court cited the *Young* case, it made no attempt to recognize the holding therein, did not distinguish it factually, and did not discuss it in any way. Assuming the *Sisk* decision conflicts with that in *Young*, *Young* controls here. If two decisions conflict within a circuit, the earlier decision controls unless the circuit decides the question *en banc* or the Supreme Court reverses the earlier panel, neither having occurred here. See *United States v. Hardesty*, 977 F.2d 1347, 1347-48 (9th Cir. 1992) (*en banc*); *United States v. Magana*, 797 F.2d 777, 779 (9th Cir. 1986).

In its latest case on the issue of good-time credit *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364 (1994), the Supreme Court specifically addressed the question of "whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. s 1983." *Id*. at 2364. The Court affirmed a Seventh Circuit judgment that "[i]f, regardless of the relief sought, the plaintiff in a federal civil rights action is challenging the legality of his conviction so that if he won his case the state would be obligated to release him even if he hadn't

sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so." *Heck v. State*, 997 F.2d 355, 357 (7th Cir. 1993). The Supreme Court holding also affirmed, by implication, the *Young* decision.

The Supreme Court did not address the petitioner's argument that a finding validating his damages claim would not invalidate his conviction, finding that petitioner's argument in that regard was untimely and completely factual. Mr. Balisok makes the identical argument here. "Balisok's § 1983 claim does not allege that had he been able to call certain witnesses, he would not have been found guilty in the disciplinary hearing. Therefore, he claims that "a judgment in favor of Balisok on this issue would not necessarily imply the disciplinary action was invalid. " Plaintiff's Response to Motion to Dismiss, p. 12.

This court cannot agree. Mr. Balisok seeks declaratory and injunctive relief and monetary damages for the alleged due process violations. If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid. Such a finding would be binding on a state court looking at the good-time issue, and a restoration of Petitioner's good-time credit by the state court would be required as *res*

judicata. Any other result would clearly create an inconsistent judgment by the state and federal court completely frustrating any idea of federal-state comity.

The court is satisfied that despite Petitioner's requested relief, it is clear that his due process claim is a challenge to his conviction of an offense at the disciplinary proceeding, which would affect the length of his sentence. "[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck, supra*, 114 S. Ct. at 2372. "A § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id*. at 2374.

As the Supreme Court noted in *Heck*, although a suit seeking damages for an allegedly unreasonable search, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful, "[i]n order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . ., which we hold today, does not encompass the "injury" of being convicted and imprisoned (until

his conviction has been overturned.) *Id*. at 2373.

For this court to find in favor of the Petitioner in this case, and issue a declaratory judgment that the disciplinary proceeding violated due process would clearly require a finding that the disciplinary proceeding, as well as the sanctions imposed were unconstitutional. Likewise, to award Petitioner damages for a compensable injury due to the deprivation of good time would mandate a finding that he was injured due to the unconstitutional deprivation of good-time credits, which would also clearly require the restoration of the good-time credits, thereby rendering the length of his sentence invalid. Before this court could award damages and/or declaratory or injunctive relief to Mr. Balisok on his § 1983 claim, it would have to determine that the process that resulted in the loss of his good-time credits was constitutionally infirm. If Mr. Balisok is successful in this way, the restoration of good-time credits would be required, even though that relief was not formerly sought herein. To do so, without giving the state court system an opportunity to correct the state's own constitutional errors, would result in "unnecessary friction between the federal and state court systems." *Preiser, supra* at 490. Thus, this court may not consider Plaintiff's s 1983 action until he has exhausted his state remedies as to the length of his sentence.

As previously stated, Mr. Balisok is not formally seeking

the return of his good-time credits in this action. However, he has not fully waived his good-time claim, and if he were to prevail in this court, he could then bring the good-time claim in state court. Were the state courts to subsequently uphold the taking of the good-credits, Mr. Balisok would then be entitled to bring a federal action in the same court that had earlier ruled that the taking of credits was unlawful. This would clearly frustrate the purpose of exhaustion requirement--to give state courts the first opportunity rule on the constitutional claims of state prisoners. *Id.*

Under *Heck*, the finding of this court that a judgment in favor of the Plaintiff would necessarily imply the invalidity of the disciplinary hearing and the resulting sanctions might lead to the conclusion that Plaintiff's complaint under 28 U.S.C. § 1983 should be dismissed. However, because Plaintiff is not seeking the return of his good-time credit in this action, and is seeking damages for his injury as a result of his placement in segregation and isolation, as well as his injury in losing good time, he has claimed injury separate and apart from any unconstitutional deprivation of good-time, and under *Young, supra*, the appropriate procedure is to stay Plaintiff's § 1983 action pending resolution of the good-time claim in state courts. For the reasons stated herein, **IT IS ORDERED** that Plaintiff's Complaint and the claims therein are **HEREBY STAYED**.

This court is satisfied that this decision will likely have precedential value at least within this district, and that there is a substantial ground for a difference of opinion on this issue. Therefore, the court finds that an immediate appeal from this Order may materially advance the ultimate termination of this litigation pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The Clerk is directed to enter this Order, forward a copy to counsel and close this file, subject to reopening upon a showing by the Plaintiff that he has exhausted his state remedies on his good-time claim.

DATED this 3rd day of February 1995.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
CHIEF UNITED STATES DISTRICT JUDGE

[FILED]
[April 3, 1995]

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS and TANA WOOD,

Defendants.

BEFORE THE COURT is Plaintiff's Motion for Reconsideration of the court's Order Denying Defendants' Motion to Dismiss and Staying Action (Ct. Rec. 48) heard without oral argument on March 30, 1995. Attorney Thomas "Speedy" Rice and Legal Intern Kristine Balogh of Gonzaga University Legal Assistance represent Plaintiff. Assistant Attorney Generals General Talis Abolins and Tracey Hawk represent Defendants. Having reviewed the record, and being fully advised in this matter **IT IS HEREBY ORDERED** that

Plaintiff's Motion for Reconsideration (Ct. Rec. 48) is **DENIED** for the following reasons.

The factual background of this case is set forth in the court's Order Denying Defendants' Motion to Dismiss and Staying Action entered on February 6, 1995, (Ct. Rec. 47) and will not be repeated here. The court's ruling was based on its interpretation of applicable case law, particularly Heck v. Humphrey, ___ U.S. ___, 114 S.Ct. 2364 (1994) and Young v. Kenny, 907 F.2d 874 (9th Cir. 1990). The court found that its decision was likely to have precedential value at least within this district, that there is a substantial ground for difference of opinion on the issue presented in this case, and that an immediate appeal of the court's Order may materially advance the ultimate termination of this litigation pursuant to 28 U.S.C. § 1292(b).

Following entry of that Order, on February 17, 1995, Plaintiff filed a Petition for Permission to Appeal at the Ninth Circuit. Defendants likewise filed such a Petition at the Circuit. On March 7, 1995, Plaintiff filed this Motion for Reconsideration of this court's Order in this court. On March 23, 1995, the Ninth Circuit entered an Order transferring the Petitions for Permission to Appeal to this court and directing the clerk to file them as a timely Notice of Appeal and Notice of Cross-Appeal.

Because Plaintiff's Motion for Reconsideration was not filed within 10 days from entry of the subject Order, the court will treat Plaintiff's Motion for Reconsideration as one made pursuant to Fed. R. Civ. P. 60(b). Under Rule 60(b), relief is available only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances. School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Plaintiff's Motion for Reconsideration claims only that the court erred in its interpretation of the applicable law. As the court has previously found, reasonable minds could differ as to the prevalent issue in this case, and the court is satisfied that an immediate appeal is the most expedient way of resolving it. Accordingly, Plaintiff's Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED. The Clerk is directed to enter this Order, and forward a copy to counsel.

DATED this 31st day of March 1995.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
CHIEF UNITED STATES DISTRICT JUDGE

[FILED]
[January 26, 1994]

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-0416-JLQ

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

JERRY B. BALISOK,

PLAINTIFF,

v.

GARY EDWARDS; TANA WOOD,

DEFENDANTS.

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

This is a civil rights complaint under 42 U.S.C. §1983 filed by Jerry B. Balisok, a pretrial detainee currently being housed at Washington State Penitentiary. Plaintiff is a pretrial detainee due to the fact that his former conviction was overturned by the Washington State court of Appeals, Division I, on December 31, 1992 and plaintiff was remanded for trial. The decision of the appeals Court is published in 68 Wn App

277. Plaintiff alleges violation of his constitutional rights and is seeking money damages, declaratory judgement, and injunctive relief. Plaintiff requests a trial by jury.

JURISDICTION

This is a civil rights action under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §1343 and §1331.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b) as all acts portrayed in the facts section occurred in Walla Walla County and all defendants live in Walla Walla County, which is within the Eastern District Court's Judicial District.

PARTIES

Plaintiff Jerry B. Balisok is a pretrial detainee presently housed at Washington State Penitentiary (WSP), Walla Walla, Washington.

Defendant Gary Edwards was a Corrections Lieutenant assigned to be in charge of and conduct Major Infractions Hearings at the Intensive Management Unit (IMU) at WSP, on August 25, 1993 through and including October 7, 1993.

Defendant Tana Wood was the Superintendent at WSP from August 25, 1993 throughand including October 29, 1993.

FACTS

1. Plaintiff was placed in Administrative Segregation on August 4, 1993 based on confidential information supplied by

inmate John Adams, DOC #287645.

2. Plaintiff was given a HEARING NOTICE/APPEARANCE WAIVER for a major infraction hearing on August 18, 1993. Plaintiff received the NOTICE after having been placed in the Intensive Management Unit (IMU) at Washington State Penitentiary on the same day.

3. The NOTICE informed plaintiff that his disciplinary hearing was scheduled for August 20, 1993.

4. Plaintiff did not receive his INFRACTION REPORT until he arrived at the HEARING. The HEARING was conducted by defendant Edwards.

5. Plaintiff was shown the INFRACTION REPORT and asked to comment on it, by defendant Edwards.

6. Plaintiff requested an extension of time so he could address the information in the INFRACTION REPORT and resolve it against the one inch thick stack of witness statements and evidence against him that had been received on August 18, 1993 with the NOTICE.

7. Plaintiff received the time extension and the HEARING met again on August 25, 1993, at which time defendant Edwards requested an extension of time. Plaintiff agreed to the time extension.

8. The HEARING was reconvened on September 2, 1993.

9. Plaintiff was found guilty of four major infractions.

10. Plaintiff was sanctioned with 10 days of isolation time; 20 days segregation time; and loss of 30 days good-time from his sentence.

11. On August 18, 1993 plaintiff had requested witness statements from inmate John (Jack) Stein, DOC #955827.

FACTS

12. Mr. Stein's witness statement was required by defendant Edwards to be submitted no later than August 20,1993.

13. Mr. Stein completed his witness statement and submitted it on August 19, 1993.

14. Mr. Stein's witness statement completely exculpated plaintiff of any wrongdoing in connection with his four major infractions of August 16, 1993. These are the same infractions described in paragraph 6.

15. Plaintiff appealed his infractions of August 16, 1993 on September 2, 1993, the same day he was found guilty.

16. Plaintiff's appeal was returned to him. Plaintiff was instructed by letter that his appeal was too long at eight pages and that he should limit it to two pages..

17. Plaintiff returned the appeal in its full lenghth with the letter requesting it be no more than two pages in lenghth.

18. Plaintiff wrote on the letter: "I suggest that you read the instruction in #2 above carefully, to wit: '2. This appeal should be:' The word 'should' denotes that the instruction is a suggestion, not a hard and fast rule. The word 'should' does not fill the requirement of 'mandatory language,' but rather it is conditional language predicated on my choice, not the institution since they are giving me the leeway by using only a suggestion in their instructions. My decision to have WSP adhere to their own rules; stick to the non-mandatory and conditional nature of the instruction. Failure to do this will result in another serious due process violation. I demand, as is my right, under the due process clause of the 14th amendment to the U.S. Constitution and Article 1, §3 of the constitution of the State of Washington, that my appeal be accepted in its full 8 page form and that it be granted. For Instruction 2 to be mandatory it should read: 'This appeal (must; shall) be:,' but since it is not

FACTS

18. (continued) worded that way, I do not have to limit my appeal to 2 pages. Deny my appeal for exceeding 2 pages in lenghth or for any other reason and let the games begin. I'm looking forward to hearing a federal judge tell Dodd, Van Boening, Walter Ponti, Snively, Henderson, Edwards, et al that they are criminals. The placing of me on 23 hour a day

lockdown, given my pretrial detainee, is just icing on the cake. Turn down my appeal at your own legal peril. s/Jerry Balisok 964334. P.S. The institution did not mind prosecuting me on false information with over 50 pages of lies. How am I supposed to defend myself against 50 pages of lieswith only two pages of truth?"

19. Plaintiff resubmitted his appeal, the letter, and his note on September 3, 1993.

20. On September 18, 1993 Corrections Officer (C/O) Hamilton informed plaintiff that plaintiff would begin 10 days of isolation time as prescribed by the sanction ordered by defendant Edwards.

21. Plaintiff filed a grievance complaining that the sanction was being imposed without the latest results from his HEARING APPEAL and because plaintiff had not received notice through an INFRACTION SANCTION NOTICE that his sanction would begin.

22. Defendant Edward responded to plaintiff's grievance. Defendant Edwards responded that plaintiff had submitted an 8 page appeal, it had been rejected and that plaintiff had not resubmitted it.

23. Defendant Edwards is lying about plaintiff not having resubmitted his appeal. The proof of that is that when plaintiff was released from IMU he requested a records review.

24. PLaintiff found photocopies of his appeal, the letter suggesting he limit his appeal to two pages, plaintiff's note as described in paragraph 18, and Mr. Stein's witness statement dated August 19, 1993, in his central file during his records review.

FACTS

25. On September 2, 1993 plaintiff asked Defendant Edwards to read Mr. Stein's witness statement in to the record of the HEARING.

26. Defendant Edwards told plaintiff that Mr. Stein had not turned in a witness statement.

27. Defendant Edwards lied to plaintiff about Mr. Stein not having turned in a witness statement.

28. Defendant Edwards withheld Mr. Stein's witness statement from the HEARING.

29. Defendant Edwards withheld Mr. Stein's witness because it contained exculpatory evidence that would have totally cleared plaintiff.

30. Defendant Edwards punishing plaintiff by placing a disciplinary sanction against him of 10 days isolation, 20 days segregation, and 30 days loss of good-time violated plaintiff's right to due process.

31. Plaintiff requested a staff advisor because he had previously attempted suicide in ISU 4-wing and was presently

suffering from sensory deprivation psychosis.

32. Defendant Edwards denied plaintiff a staff advisor, which violated plaintiff's right to due process.

33. On August 25, 1993 Lt. Edwards asked plaintiff if he wanted any additional witness statements. Plaintiff responded that he wanted witness statements sent to inmates Charles Harris and Sherman Pulley and that plaintiff wanted defendant Edwards to take down the questions that plaintiff wanted inmates Harris and Pulley to answer. Lt. Edwards responded that he would write down the questions at the next HEARING on September 2, 1993.

34. On September 2, 1993 at plaintiff's HEARING the first thing plaintiff requested was the Lt. Edwards take down the questions plaintiff wanted asked of inmates Harris and Pulley.

FACTS

35. Defendant Edwards response to plaintiff's request was that he had already sent out the witness statements and that inmates Pulley and Harris had not responded.

36. Defendant Edwards lied to plaintiff again. Plaintiff found inmate Pulley's witness statement in his central file during his records review.

37. Inmate Pulley stated that he did not know why plaintiff was in segregation.

38. Had defendant Edwards kept his word and allowed plaintiff to pose questions to inmate Pulley, plaintiff could have proven that inmate Adams had lied about an incident that Pulley witnessed and proven that Adams was causing an innocent person to be moved against, in violation of WAC 137-28-552, a major offense.

39. Defendant Edwards denied plaintiff a fair hearing by withholding Mr. Stein's witness statement.

40. Defendant Edwards denied plaintiff a fair hearing by refusing to take down questions for inmates Pulley and Harris to answer.

41. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement, on September 2, 1993.

42. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

43. Defendant Edwards finding plaintiff guilty of four major infractions, while withholding Mr. Stein's witness statement, denied plaintiff a fair hearing.

44. Defendant Edwards finding plaintiff guilty of four major infractions, without posing questions to inmates Harris and Pulley, denied plaintiff a fair hearing.

FACTS

45. On August 18, 1993 plaintiff requested a witness statement from Mrs. Ruth Greenway, a teacher on the Education Floor. Mrs. Greenway had direct and personal knowledge that Adams was lying to staff about several of his claims.

46. Defendant Edwards failed to send Mrs. Greenway a witness statement.

47. Defendant Edwards failure to send a witness statement to Mrs. Greenway denied plaintiff a fair hearing.

48. On September 2, 1993 defendant Edwards told plaintiff that CUS Ken Jurgenson had submitted a witness statement, but he refused to allow plaintiff to see it, read it, and he refused to read it into the record. Defendant Edwards offered no explanation for his refusals.

49. Plaintiff discovered in another document prepared by CUS Jurgenson that Adams had put one account of his lies in writing and had told a contradictory account to CUS Jurgenson, which Jurgenson had noted.

50. Plaintiff alleges that defendant Edwards withheld CUS Jurgenson's witness statement because it contained exculpatory evidence that would have cleared plaintiff.

51. Defendant Edwards withholding CUS Jurgenson's statement denied plaintiff a fair hearing.

52. On September 2, 1993 plaintiff informed defendant Edwards that inmate David Jirovec had written plaintiff and had informed him that a large number of inmates had told him that they had personal knowledge that plaintiff had been set up by Adams.

53. Plaintiff requested that defendant Edwards take a witness statement from inmate Jirovec.

54. Defendant Edwards refused to take a witness statement from inmate Jirovec.

FACTS

55. Defendant Edwards refusing to take a witness statement from inmate Jirovec denied plaintiff a fair hearing.

56. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement from plaintiff.

57. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

58. Defendant Edwards found plaintiff guilty of four major infractions on September 2, 1993.

59. On FORM D, page 1 of 3, defendant Edwards summarized the reasons for finding plaintiff guilty as: "Written rpt and testimony, documents provided."

60. Defendant Edwards did not state which written report was used to find plaintiff guilty.

61. Defendant Edwards did not state who submitted the written report that was used to determine guilt.

62. Defendant Edwards did not specify which of the documents was used to determine guilt.

63. Defendant Edwards did not specify whose testimony was used to determine guilt.

64. Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement from inmate Jirovec or Mrs Greenway.

65. The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for by staff. Because staff did not look for

FACTS

65. (continued) plaintiff's appeal plaintiff was denied his rights to appeal, in violation of WAC 137-28-115 (1)(2)(3)(4)(5).

66. The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff a fair hearing and violated his rights to due process.

67. The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good-time denied plaintiff due process.

68. The decision of defendant Edwards to deny plaintiff a staff advisor denied plaintiff due process.

69. The decision of defendant Edwards to refuse to take down questions for inmates Harris and Pulley to answer on their witness statements denied plaintiff due process.

70. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates harris and Pulley to answer on September 2, 1993 denied plaintiff due process.

71. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement denied plaintiff due process.

72 The decision of defendant Edwards to find plaintiff guilty of four major infractions knowing that he had refused to send Mrs. Greenway a witness statement denied plaintiff due process. This decision was made despite plaintiff having told defendant Edwards that Mrs. Greenway had direct and personal

knowledge that Adams was lying to staff about several of his claims.

73. The decision of defendant Edwards to withhold CUS Jurgenson's witness statement from plaintiff and his decision to refuse to read

FACTS

73. (continued) CUS Jurgenson's witness statement into the record denied plaintiff due process. Defendant Edwards made this decision despite plaintiff having told him that Adams had told CUS Jurgenson one version of the events in writing and then had told another version of the events verbally and that CUS Jurgenson had noted the discrepancy.

74. The decision of defendant Edwards to refuse to take a witness statement from inmate Jirovec denied plaintiff due process.

75. The decision of defendant Edwards to find plaintiff guilty of four major infractions while knowing that he had refused to take a witness statement from inmate Jirovec while knowing that inmate Jirovec had knowledge of other individuals that had personal and direct knowledge that Adams had set plaintiff up on false charges denied plaintiff his right to due process.

76. The decision of defendant Edwards to summarize the reasons for finding plaintiff guilty of four major infractions

by writing, "Written rpt and testimony, documents provided," denied plaintiff his right to due process

77. The decision of defendant Edwards to fail to state which written report was used to find plaintiff guilty of four major infractions violated plaintiff's right to due process.

78. The decision of defendant Edwards to fail to state who submitted the written report that was used to find plaintiff guilty of four major infractions was used to determine that plaintiff was guilty of four major infractions violated plaintiff's right to due process.

79. The decision of defendant Edwards to fail to state his individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway, which caused plaintiff to be found guilty of four major infractions denied plaintiff due process.

FACTS

80. The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through and including October 7, 1993.

81. The actions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through and including October 7, 1993.

82. Defendant Edwards causing plaintiff to be in IMU from September 2, 1993 through October 7, 1993 has violated

plaintiff's right to due process.

83. On October 19, 1993 plaintiff wrote to defendant Wood and asked her to reconsider my infraction appeal because defendant Edwards had lied to her concerning my appeal not being resubmitted and because he had withheld Mr. Stein's witness statement from the proceedings.

84. Defendant wood responded to plaintiff's request with her SUPERINTENDENT'S MEMORANDUM of October 29, 1993 and refused to overturn defendant Edwards ruling and sanctions.

85. The decision of defendant Wood to refuse to remove the infractions and sanctions from plaintiff's records has denied plaintiff due process.

86. The due process that plaintiff was due from defendant Wood was the removal of these false infractions from plaintiff's record and the restoration of plaintiff's good-time credits since plaintiff was denied due process during the disciplinary hearing conducted by defendant Edwards.

CLAIMS

FIRST CAUSE OF ACTION

87. The actions and/or decisions of the defendants in paragraphs 1 through 86 violated plaintiff's right to due process while acting under color of state law, in violation of the Fourteenth Amendment.

88. Plaintiff's right to due process was violated when:

a) Defendant Edwards withheld Mr. Stein's witness statement from plaintiff's disciplinary hearing of September 2, 1993.

b) Defendant Edwards denied plaintiff a staff advisor at plaintiff's disciplinary hearing of September 2, 1993.

c) Defendant Edwards sent out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted answered.

d) Defendant Edwards made the decision to send out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff that plaintiff wanted asked.

e) Defendant Edwards made the decision to withhold Mr. Stein's witness statement.

f) Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

g) Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions

from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

h) Defendant Edwards made the decision to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

i) Defendant Edwards failed to send Mrs. Greenway a witness statement.

j) Defendant Edwards withheld CUS Jurgenson's witness statement.

k) Defendant Edwards failed to send inmate Jirovec a witness statement.

l) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement from plaintiff.

m) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

n) Defendant Edwards did not state which written report was used to find plaintiff guilty.

o) Defendant Edwards did not state who submitted the written report that was used to determine guilt.

p) Defendant Edwards did not specify which of the documents was used to determine guilt.

q) Defendant Edwards did not specify whose testimony was used to determine guilt.

r) Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement to inmate Jirovec or Mrs. Greenway.

s) The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for

CLAIMS

FIRST CAUSE OF ACTION

88. continued

s) (continued) by staff. Because staff did not look

for plaintiff's appeal WAC 137-28-115(1)(2)(3)(4)(5) was violated.

t) The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff due process.

u) The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good-time denied plaintiff due process.

v) Defendant Edwards decided to deny plaintiff a staff advisor.

w) Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

x) Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had refused to send Mrs. Greenway a witness statement.

y) Defendant Edwards decided to not send Mrs. Greenway a witness statement.

z) Defendant Edwards decided to withhold CUS Jurgenson's witness statement.

aa) Defendant Edwards decided to not read CUS Jurgenson's witness statement into the record.

ab) Defendant Edwards decided to not send inmate Jirovec a witness statement.

ac) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

ad) Defendant Edwards decided to find plaintiff guilty of four major infractionsknowing that he had ~~had~~ refused to read CUS Jurgenson's witness statement into the record.

ae) Defendant Edwards decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

af) Defendant Edwards decided to not state which written report was used to find plaintiff guilty of four major infractions.

ag) Defendant Edwards decided to not state who submitted the written report that was used to

find plaintiff guilty of four major infractions.

ah) Defendant Edwards decided to not state the individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway.

ai) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

aj) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he decided to not state which written report was used to find plaintiff guilty of four major infractions.

ak) Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

CLAIMS

FIRST CAUSE OF ACTION

88. continued

al) Defendant Edwards found plaintiff guilty of four major infractions knowing that he had decided to not submit witness statements to inmate Jirovec and Mrs. Greenway.

am) The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through October 7, 1993.

an) The actions of defendant Edwards caused plaintiff to be held in IMU from September 2, 1993 through October 7, 1993.

ao) Defendant Wood decided to refuse to remove the four major infractions from plaintiff's records..

ap) Defendant Wood refused to remove the four major infractions from plaintiff's records.

aq) Defendant Wood decided to allow the four major infractions to remain on plaintiff's record.

ar) Defendant wood allowed the four major infractions to remain on plaintiff's record.

RELIEF

Wherefore plaintiff Jerry B. Balisok requests this Honorable Court grant the following relief:

A. Issue a declaratory judgment that defendants violated the Fourteenth Amendment when:

1. Defendant Edwards withheld Mr. Stein's witness statement from plaintiff's disciplinary hearing of September 2, 1993.
2. Defendant Edwards denied plaintiff a staff advisor at plaintiff's disciplinary hearing of September 2, 1993.
3. Defendant Edwards sent out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted answered.
4. Defendant Edwards made the decision to send out witness statements to inmates Harris and Pulley before plaintiff could give him the questions that plaintiff wanted asked.
5. Defendant Edwards made the decision to withhold Mr. Stein's witness statement.
6. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had withheld Mr. Stein's witness statement.

7. Defendant Edwards found plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates harris and Pulley to answer, on September 2, 1993.
8. Defendant Edwards made the decision to find plaintiff guilty of four major infractions while knowing that he had violated his promise to take down questions from plaintiff for inmates Harris and Pulley to answer, on September 2, 1993.

RELIEF

A. continued

9. Defendant Edwards failed to send Mrs. Greenway a witness statement.
10. Defendant Edwards withheld CUS Jurgenson's witness statement.
11. Defendant Edwards failed to send inmate Jirovec a witness statement.
12. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's

witness statement from plaintiff.

13. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had refused to send a witness statement to inmate Jirovec.

14. Defendant Edwards did not state which written report was used to find plaintiff guilty.

15. Defendant Edwards did not state who submitted the written report that was used to determine guilt.

16. Defendant Edwards did not specify which of the documents was used to determine guilt.

17. Defendant Edwards did not specify whose testimony was used to determine guilt.

18. Defendant Edwards did not state his individualized reasons for refusing to submit a witness statement to inmate Jirovec or Mrs. Greenway.

19. The decision of defendant Edwards to lie on plaintiff's grievance concerning plaintiff not having resubmitted his

appeal stopped plaintiff's appeal from being submitted to the Superintendent for review of plaintiff's having been found guilty caused plaintiff's appeal to not be looked for by staff. Because staff did not look for plaintiff's

RELIEF

A. continued

19. (continued) appeal WAC 137-28-115(1)(2)(3)(4)(5) was violated.

20. The decision of defendant Edwards to lie to plaintiff concerning Mr. Stein's witness statement being submitted and then to withhold the statement denied plaintiff due process.

21. The decision of defendant Edwards to punish plaintiff with a disciplinary sanction of 10 days isolation, 20 days segregation, and 30 days loss of good time denied plaintiff due process.

22. Defendant Edwards decided to deny plaintiff a staff advisor.

23. Defendant Edwards decided to find plaintiff guilty of four major infractions

while knowing that he had withheld Mr. Stein's witness statement.

24. Defendant Edwards decided to find plaintiff guilty of four major infractions while knowing that he had refused to send Mrs. Greenway a witness statement.

25. Defendant Edwards decided to not send Mrs. Greenway a witness statement.

26. Defendant Edwards decided to withhold CUS Jurgenson's witness statement.

27. Defendant Edwards decided to not read CUS Jurgenson's witness statement into the record.

28. Defendant Edwards decided to not send inmate Jirovec a witness statement.

29. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had withheld CUS Jurgenson's witness statement.

30. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had refused to read

CUS Jurgenson's witness statement into the record.

RELIEF

A. continued

31. Defendant Edwards decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

32. Defendant Edwards decided to not state which written report was used to find plaintiff guilty of four major infractions.

33. Defendant Edwards decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

34. Defendant Edwards decided to not state the individualized reasons for refusing to submit witness statements to inmate Jirovec and Mrs. Greenway.

35. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding

plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

36. Defendant Edwards decided to find plaintiff guilty of four major infractions knowing that he had decided to summarize the reasons for finding plaintiff guilty of four major infractions by writing, "Written rpt and testimony, documents provided."

37. Defendant Edwards to find plaintiff guilty of four major infractions knowing that he had decided to not state who submitted the written report that was used to find plaintiff guilty of four major infractions.

38. Defendant Edwards found plaintiff guilty of four major infractions knowing that he had decided to not submit witness statements to inmate Jirovec and Mrs. Greenway.

39. The decisions of defendant Edwards caused plaintiff to be held in IMU from September 2 through October 7, 1993.

RELIEF

A. continued

40. The actions of defendant Edwards caused plaintiff to be held in IMU from September 2 through October 7, 1993.

41. Defendant Wood decided to refuse to remove the four major infractions from plaintiff's records.

42. Defendant Wood refused to remove the four major infractions from plaintiff's records.

43. Defendant Wood allowed the four major infractions to remain on plaintiff's record.

44. Defendant wood decided to allow the four major infractions to remain on plaintiff's record.

RELIEF

B. Issue an injunction ordering that defendants or their agents:

1. Refrain from violating plaintiff's constitutional rights for the remainder of his stay in the custody of the Washington State Penitentiary.

2. Observe all the due process safeguards in Wolff v. McDonell, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963; Ponte v. Real, 471 US 491, 85 L. Ed. 2d 553, 105 S. Ct. 2192; and Bartholomew v. Watson, 665 F 2d 915 (9th Cir. 1982) when conducting disciplinary hearings.

3. Remove the four major infractions that defendant Edwards found plaintiff guilty of on September 2, 1993 from plaintiff's records and free plaintiff from all residual effects that he might or will endure from his being infracted, pursuant to Hayes v. Thompson, 637 F 2d 483 (7th Cir. 1980).

RELIEF

C. Grant compensatory damages to the plaintiff in the following amounts, to be proven at trial, but in no event less than:

1. $36,000.00 against defendant Gary Edwards.

2. $4,000.00 against defendant Tana Wood.

D. Grant punitive damages to plaintiff in the following amounts, to be proven at trial, but in no event less than:

1. $ 36,000.00 against defendant Gary Edwards.

2. $4,000.00 against defendant Tana Wood.

E. Grant costs to plaintiff to be proven at trial.

F. Grant other and further relief as it may appear this Court deems to be just and equitable for plaintiff to receive.

/s/ Jerry B. Balisok 12/5/93
JERRY B. BALISOK
PLAINTIFF PRO SE

PLAINTIFF'S ADDRESS:
JERRY B. BALISOK-964334
WASHINGTON STATE
PENITENTIARY
PO BOX 520
WALLA WALLA, WA

[FILED]
[October 28, 1994]

APPENDIX I

Thomas H. Speedy Rice
Kristine Balogh
University Legal Assistance
1220 N. Dakota Street
P.O. Box 3528
Spokane, WA 99220-3528
(509) 484-6091

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-93-416-JLQ

PLAINTIFF'S AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

I. NATURE OF THE CLAIM

1. Plaintiff, Jerry B. Balisok, files this Amended Complaint as a matter of right pursuant to Federal Rule of Civil

Procedure 15. Plaintiff, a Washington State prison inmate, alleges Defendants, Gary Edwards and Tana Wood, used procedures to impose disciplinary action which violated his constitutional right to due process. Plaintiff is requesting relief be granted pursuant to 42 U.S.C. § 1983, in the form of monetary damages and injunctive relief.

II. JURISDICTION

2. The District Court has jurisdiction of Balisok's claim based on 28 U.S.C. § 1331, because he alleges Defendants violated the due process clause of the Fourteenth Amendment to the United States Constitution.

III. VENUE

3. The proper venue for Plaintiff's claim is the Eastern District of Washington because all the events and omissions mentioned in this Amended Complaint occurred in the Washington State Penitentiary, in Walla Walla, Washington.

IV. PARTIES

4. During the time of the allegations made herein, Plaintiff, Jerry B. Balisok was imprisoned under the status of a pretrial detainee at the Washington State Penitentiary, in Walla Walla, Washington.

5. During the time of the allegations made herein, Defendant Gary Edwards was the Lieutenant assigned to be in charge of major infractions at Washington at Washington State

Penitentiary, in Walla Walla, Washington.

6. During the time of the allegations made herein, Defendant Tana Wood was Superintendent at Washington State Penitentiary, in Walla Walla, Washington.

V. FACTUAL ALLEGATIONS

7. On or about August 4, 1993, Plaintiff Balisok, was placed in administrative segregation due to an allegation that Balisok committed prison infractions.

8. On or about August 16, 1993, an Infraction Report charged Balisok with the following infractions: (1)extortion, blackmail; (2) threatening another; (3) attempting to have an innocent person proceeded against by lying to staff; and (4) theft, possession of stolen property. (Ex. 1, Copy of Infraction Reports.)

9. Balisok remained in segregation until about August 18, 1993, when he was moved from segregation to the isolation unit.

10. On or about August 18 1993, Balisok received notice that a disciplinary hearing would be conducted regarding the infractions. The hearing was held on or about September 2, 1993.

11. On or about August 18, 1993, Balisok asked Defendant Edwards to obtain a witness statement from inmate John (Jack) Stein.

12. At the hearing on or about September 2, 1993, Balisok requested that Defendant Edwards read Stein's witness statement into the record.

13. Defendant Edwards replied that Stein never submitted a witness statement regarding the chargers against Balisok.

14. However, Stein did prepare and submit a witness statement. When Balisok was released from isolation on October 7, 1993, he reviewed his central file and found Stein's witness statement which was dated August 19, 1993, in Stein's handwriting.

15. There was no date stamped into Stein's witness statement indicating it had been received by the officer.

16. It is general practice at the correctional institution to collect witness statements and stamp the statements with the date it was received.

17. The prison officials at the correctional institution do not date stamp witness statements which are made in reference to a "jail house attorney".

18. The prison officials do not stamp the statements so that in the event of a due process challenge for failure to call witnesses, a prison official may counter the challenge by saying the witness report was not submitted or was submitted late.

19. At no time has Defendant Edwards provided any reason why he denied Balisok access to Stein's witness statement, denied its existence, or refused to date stamp the statement.

20. Stein's witness statement was not stamped because Balisok is a known "jail house attorney".

21. On or about October 25, 1993, Defendant Edwards asked Balisok if he wanted any additional witness statements taken.

22. In response, Balisok requested Defendant Edwards deliver written statements to inmates Charles Harris and Sherman Pulley.

23. Additionally, Balisok requested Edwards write down some specific questions Balisok wanted inmates Harris and Pulley to answer.

24. Defendant Edwards told Balisok the specific questions would be written down at the hearing scheduled for September 2, 1993.

25. At the hearing, on or about September 2, 1993, Balisok requested Defendant Edwards take specific questions to inmates Harris and Pulley.

26. In response, Defendant Edwards stated Harris and Pulley did not return the witness statements.

27. Balisok's questions were not written down or even submitted to inmates Harris and Pulley as requested by Balisok.

28. Witness statements for Harris and Pulley were found in Balisok's central file during the review on or about October 7, 1993, in contradiction to Defendant Edwards statement.

29. Defendant Edwards has not provided any reason for denying Balisok access to Harris and Pulley's statements.

30. On September 2, 1993, Defendant Edwards found Balisok guilty of all four infractions of which Balisok was charged and was sentenced to 10 days isolation, 20 days segregation and lost 30 days good time credit.

31. On Form D, page 1 of 3, of the Disciplinary Minutes and Findings, Defendant Edwards stated the reason for the finding of guilt as "written rpt. and testimony, documents provided." (Ex. 2, Disciplinary Minutes and Findings, pg. 1).

32. Nowhere in Form D did Defendant Edwards specify the name of the witness who provided the testimony or statement which supported the finding of guilt, nor did he state which report provided support for the finding of guilt.

33. Nowhere in Form D did Defendant Edwards specify the substance of the witness statements, written report or testimony which provided the reason for the finding of guilt.

34. Defendant Edwards has never provided Balisok with a verbal or written statement which specifies the facts or

circumstances which supported the finding that Balisok was guilty of the four infractions.

35. Defendant Edwards did not provide an explanation in the Disciplinary Findings as to why he chose to do the following:

(a) why Defendant Edwards did not allow Balisok to access certain witness statements;

(b) why Defendant Edwards denied the existence of certain witness statements; or

(c) why Defendant Edwards refused to date stamp all witness statements made in reference to Balisok.

36. On or about September 2, 1993, Balisok appealed the Edwards findings from the disciplinary hearing. He submitted an eight page appeal to a Correctional Officer to be sent to the Superintendent, Tana Wood.

37. Balisok's eight page appeal was return to him with a letter stating the appeal was too long. Balisok was also given an appeal instruction sheet which stated that an appeal "should" be two pages in length.

38. On or about September 3, 1993, Balisok returned his eight page appeal. He accompanied the appeal with a note arguing there was no requirement that an appeal be two pages since the appeal instruction stating the appeal "should" be two pages was merely suggestive, not mandatory.

39. On or about September 18, 1993, Balisok filed a grievance report alleging his sanction was about to be imposed while his appeal was still being considered. In addition, he alleged he had not received adequate notice as to when his sanction would begin.

40. In response to the grievance, Defendant Edwards determined that Balisok's note arguing the appeal need not be two pages was not a resubmission of his appeal.

41. Defendant Edwards summarily replied to Balisok's grievance that he had submitted an eight page appeal, it was rejected and Balisok never resubmitted an appeal.

42. Balisok's central file contains the eight page appeal, the letter stating the appeal was too long, and Balisok's note resubmitting the appeal and alleging the appeal was not too long.

43. On or about October 19, 1993, Balisok wrote Superintendent Tana Wood, requesting the infraction appeal be reconsidered. This letter explained Balisok had in fact resubmitted his appeal and that witness statements had been withheld at his disciplinary hearing.

44. On or about October 29, 1993, Defendant Wood responded in a Superintendent Memorandum. The memorandum stated Edward's disciplinary ruling and sanctions would stand.

45. Defendant Wood did not provide the explanation for denying Balisok's request for reconsideration.

VI. PLAINTIFF'S CLAIMS FOR RELIEF

Plaintiff herein incorporates and reallege, as though set forth herein, Paragraphs 1 through Paragraph 51.

46. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla, Washington, under the color of state law, failed to follow the proper disciplinary hearing procedures to accept and deny an inmate's request to call witnesses which are in violation of due process.

47. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla, Washington, under color of state law, failed to follow the proper procedures to document the disciplinary hearing findings which violated Balisok's due process rights.

48. Defendant Edwards, acting in his individual capacity as Lieutenant assigned to be in charge of major infractions at Washington State Penitentiary, at Walla Walla Washington, under color of state law, failed to follow the proper procedures to document the reason Plaintiff's request to appeal the disciplinary action which violated Balisok's due process rights.

49. Defendant Wood, acting in her independent capacity as Superintendent at Washington State Penitentiary, at Walla Walla Washington, under color of state law, failed to follow the

proper procedures to document the reason Plaintiff's request to appeal the disciplinary action which violated Balisok's due process rights.

WHEREFORE, Plaintiff Balisok seeks the following relief and damages:

1. declaratory relief stating the procedures used by Defendant Edwards and Wood violated Plaintiff Balisok's constitutional right to due process;

2. injunctive relief to prevent the constitutional violations from occurring in the future in the form of an order requiring prison officials to fully and fairly follow the procedures established for these types of hearings and further, to require the prison officials to date stamp all documents, including witness statements, at the time and date first received by prison officials;

3. compensatory and punitive damages for the harm sustained from the use of unconstitutional procedures; and

4. any other relief the Court deems equitable and just.

Dated this 28th day of October, 1994.

UNIVERSITY LEGAL ASSISTANCE

/s/ Speedy Rice
Thomas H. Speedy Rice
Attorney for Plaintiff

/s/ Kristine Balogh
Kristine Balogh
Legal Intern for Plaintiff

[FILED]
[January 19, 1995]

Thomas H. Speedy Rice
Kristine Balogh
University Legal Assistance
1220 N. Dakota Street
P.O. Box 3528
Spokane, WA 99220-3528
(509) 484-6091

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-93-416-JLQ

ORDER FOR
INTERLINEATION

JERRY B. BALISOK,

Plaintiff,

vs.

GARY EDWARDS, et al.,

Defendants.

This Court grants Plaintiff's Request for Interlineation and orders the Clerk of the Court to make the following interlineations:

(a) in Plaintiff's Amended Complaint and Demand for Jury Trial, p. 4, L 8, cross out "October" and interlineate "August";

(b) in Plaintiff's Amended Complaint and Demand for Jury Trial, p. 8, L 9, cross out "independent" and interlineate "individual"; and

(c) in Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss and Request for Hearing, p. 4, L 8, cross out "Balisok" and interlineate "Defendant Edwards".

DATED this 16th day of January, 1995.

/s/Justin L. Quackenbush
United States District Judge

APPENDIX K

DEPARTMENT OF CORRECTIONS FORM B

INFRACTION REPORT

WASHINGTON STATE PENITENTIARY
INSTITUTION

08/20/93 Attached Unit 4 D 14

OFFICER'S REPORT

Name: BALISOK, JERRY DOC # 964334
DATE: 08/16/83 [Monday]

NUMBER OF RULE VIOLATED:
503 extortion, blackmail
506 threatening another
552 attempting/causing innocent person proceeded against by lying to staff
555 theft/possession of stolen property

TIME: 0900 hours approx

PLACE: Education

DETAILS IN FULL: On 8/16/93 an investigation into alleged misconduct in the Education Department by I/M Balisok 962334 was concluded. It was determined I/M Balisok did attempt to black mail I/M Adams 287645 into lying about an innocent person. He Threatened I/M Adams by stating he would circulate letters through the inmate population that revea! I/M Adams as an "informant" subjecting him to harm. I/M Balisok attempted to cause an innocent person to be proceeded against by lying to Ms. Greenway about her teacher's aid. I/M Balisok did steal copies of letters from I/M Adams.

WITNESSES:

/s/ CUS Ken Jurgensen
OFFICER'S SIGNATURE

Was inmate informed of right to remain silent? yes

Did inmate make statement after being informed of his/her rights? yes

If so, what?

I provided three sheets of paper for my defense, given to Ad-seg not returned yet. Was tutoring Adams at the request of Ms Greeway - I agreed I helped Adams and he was to help me with my legal work in the spring - The Information on Adams Being A snitch was openly discussed in front of a class - (Balisok) I believe Adams is trying to get to McNeal Island - Meeting Between Adam & Balisok in the dining hall did occur.

8-20-93
DATE

ACTION

PLEA: ■ NOT GUILTY □ GUILTY

FOUND: □ NOT GUILTY ■ GUILTY

REASON: Written Report - Investigation documents - Testimony - I Believe CUS Jurgensen's Investigation is correct.

SANCTION: (1) 10 days Iso
(2) 20 days Seg
(3) Loss of 30 days G.T.

/s/ G. S. Edwards
Lt. T. D. Gleason
HEARING OFFICER

/s/ R. Van Boening
for TANA WOOD
SUPERINTENDENT

■ WILL APPEAL □ NO APPEAL
no appeal received

APPENDIX L

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS

INMATE NAME (LAST, FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 8-20-93
TIME OF HEARING: 1:10 p.m.
INFRACTION DATE: 8-16-93
WAIVED 24 HOURS NOTICE: ☐ YES ☒ NO
WAIVED APPEARANCE: ☐ YES ☒ NO

INMATE'S PLEA: GUILTY ___, ___, ___, ___
NOT GUILTY 503, 506, 552, 555

INTERPRETER: ☐ YES ☒ NO
NAME: _____

STAFF ADVISOR: ☐ YES ☒ NO
NAME: _____

COMPETENCY CONCERN: ☐ YES ☒ NO

HEARING IMPAIRED: ☐ YES ☒ NO

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCEUSED/FINDINGS/REASONSFOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION: I gave 3 sheets of paper (hand written) to the Adseg Comm. this morning. I was told the papers would be returned to me before this hearing, but I haven't received them yet. These papers constitute 4 hours of work. Mr. Adams and I did not have any agreement. I tutored Adams at Ms. Greeway's request with [continued on page L-3]

LIST EACH WAC 137-28 RULE VIOLATION SEPARATELY:

INFRACTION NO. 503
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON: written rpt. and testimony,

INFRACTION NO. 506
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON: documents provided

INFRACTION NO. 552
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON:

INFRACTION NO. 555
FOUND: GUILTY ☐ NOT GUILTY ☐
REASON:

SANCTION(S): 10 days iso, 20 days seg, loss 30 days good time

REASON(S):

I HAVE RECEIVED A COPY OF THIS FORM
in restraints
INMATE OR STAFF WITNESS SIGNATURE

APPEAL? ■ YES ☐ NO

/s/ G. L. Edwards
HEARING OFFICER SIGNATURE

DATE: 9-2-93

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS
(continued)

INMATE NAME (LAST FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 8-20-93
PAGE 2 of 3

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCE USED/ FINDINGS/REASONS FOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION: business math; this started last spring. I helped John with Accting during the spring qtr. so he could pass his test. He agreed to help me with my legal work. The 7/25 letter is different than the one John showed me in the library. I never took anything from him. Adams has a reputation for being the best jailhouse lawyer here. Adams needed help with his accounting class, I needed help with my legal work. I'm the smartest guy on the school floor. We go to the legal library and school together. Sometimes we see each other in the chow hall. Adams wants to sue Ms. Greenway for putting a snitch jacket on him. John told me he took the answers to the accting test off Ms. Greenways desk, but told her I gave him the answers. I never tried to black mail him, and I didn't threaten him. This was a set up.

9-2-93: Witness statements from inmates Pulley & Harris not received CUS Jurgensen's statement received. I didn't steal anything. John Adams is setting me up. I'm a pre-trial detainee - I have special rights - I'm not to be punished. My case was remanded. Adams wants to be transferred to McNeil. Adams told Jurgensen no meeting occurred between Pulley, Harris

DEPARTMENT OF CORRECTIONS FORM D
DIVISION OF PRISONS

DISCIPLINARY HEARING MINUTES AND FINDINGS
(continued)

INMATE NAME (LAST FIRST): Balisok, Jerry
DOC NUMBER: 964334
DATE OF HEARING: 9-2-93
PAGE 3 OF 3

SUMMARY OF TESTIMONY (LIST WITNESSES TESTIFYING)/EVIDENCE USED/FINDING/REASONS FOR CONTINUANCES, DECISIONS AND SANCTIONS/ANY RELEVANT INFORMATION:

and me in the dining hall.

APPENDIX M

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35484

D.C. No. CV-93-00120-FVS

OPINION

Norman Gotcher, Jr.,
Plaintiff-Appellant,

v.

TANA WOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted
August 10, 1995--Seattle, Washington

Filed October 4, 1995

Before: Robert R. Beezer and Michael Daly Hawkins,
Circuit Judges, and Dickran M. Tevrizian,* District Judge

Opinion by Judge Hawkins

---

*The Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in dismissing a Washington state prisoner's claim that loss of "good conduct time credits" constituted a compensable violation of his due process rights.

Pursuant to Washington's Sentencing Reform Act, inmates who do not commit serious infractions are entitled to good conduct time credits. Appellant Norman Gotcher, Jr., who is incarcerated in Washington State, was found guilty of serious infractions of a prison disciplinary code. As a result, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

Gotcher filed a civil rights action against appellee Superintendent of the Washington State Penitentiary Tana Wood and others (collectively, Wood). He alleged that, with regard to the disciplinary hearings on the infractions, Washington Department of Corrections (DOC) employees failed to give him proper notice of allegations and did not allow him to call witnesses or present documentary evidence. The district court granted Wood's motion to dismiss, concluding that Gotcher did

not possess a protectable liberty interest. The court applied the "mandatory language/substantive predicate" due process analysis set forth in earlier Supreme Court opinions. Gotcher appealed.

[1] Gotcher's case did not call into question the lawfulness of his continuing confinement. His case involved a claim for using the wrong procedure, not for reaching the wrong result.

[2] The Court has abandoned the "mandatory language/substantive predicate" analysis and revised the relevant due process analysis. **[3]** For purposes of that analysis, the scheme of the good conduct time credit system in Washington appeared to be indistinguishable from a good conduct time credit system which the Court, in *Wolff v. McDonnell*, found to confer a liberty interest on inmates. **[4]** Despite the fact that the DOC issued a "Policy" stating that it was not its intent to create a liberty interest, **[5]** this case fell squarely under *Wolff* with regard to whether Gotcher possessed a liberty interest in accumulating good time credits. Accordingly, the district court's ruling was reversed.

[6] The record was insufficient for a determination of whether the disciplinary segregation at issue in this case imposed an "atypical and significant hardship" on Gotcher "in relation to the ordinary incidents of prison life." Thus, remand was warranted on Gotcher's claim regarding disciplinary segregation.

COUNSEL

John Midgley, Evergreen Legal Services, Seattle, Washington, for the plaintiff-appellant.

Talis M. Abolins, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

HAWKINS, Circuit Judge:

Appellant Norman Gotcher ("Gotcher") appeals the district court's dismissal of his civil rights action against Tana Wood, the Superintendent of the Washington State Penitentiary, and others (collectively "Wood"). Gotcher's appeal presents two issues: (1) does Gotcher possess a due process liberty interest in the accrual of good conduct time, and (2) does he possess a due process liberty interest in remaining free from disciplinary segregation. The district court concluded that he possessed neither and dismissed his complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we believe the district court's dismissal of Gotcher's action was inappropriate we reverse and remand the matter to the district court.

I.

Gotcher is incarcerated in Washington State, where he is serving a sentence for burglary. He alleges in his complaint that

he was charged twice in 1992 with "serious infractions" of his prison's disciplinary code. Specifically, he was charged with "[t]hreatening another with bodily harm or with an offense against his/her person." *See* Wash. Admin. Code (WAC) § 137-28-030(506). He alleges that, with regard to the disciplinary hearings on these infractions, Washington Department of Correction (DOC) employees, among other things, failed to give him 24-hour advanced written notice of allegations against him and did not allow him to call witnesses or present documentary evidence in his defense.

Gotcher was found guilty of the serious infractions at the disciplinary hearings. As a consequence, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

This action, brought under 42 U.S.C. § 1983, followed. Among other claims, Gotcher alleges that the DOC staff failed to afford him the process he was due in connection with the disciplinary hearings. Accordingly, he claims that his loss of good conduct time credits and his disciplinary segregation constituted compensable violations of his due process rights.

Wood filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that because Washington prison inmates do not possess a liberty interest in remaining free from disciplinary action, the complaint failed to state a claim

upon which relief could be granted. In granting the motion to dismiss, the district court noted that because the Due Process Clause of the Fourteenth Amendment does not give rise to liberty interests in good conduct time credits or in remaining within the general prison population, the source of Gotcher's claimed liberty interest had to be Washington state law. Applying the "mandatory language/substantive predicate" due process analysis set forth in such Supreme Court opinions as *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989), the district court concluded that Gotcher did not possess a protectable liberty interest. The court therefore dismissed his complaint. Gotcher timely appealed that decision.

We review de novo a dismissal for failure to state a claim, as it is a ruling on a question of law. *Everett & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All allegations of fact must be taken as true and construed in the light most favorable to Gotcher. *See id.* at 229. We will not affirm such a dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

II.

As a threshold matter, Wood argues that the Supreme Court's recent decision in *Heck v. Humphrey*, 114 S. Ct. 2364

(1994), bars Gotcher's claim. In *Heck*, the Court held that, when this type of claim, if successful, will *necessarily* require a federal court to determine the constitutional validity of the inmate's continuing confinement, the claim is not cognizable until the plaintiff's sentence or conviction has already been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 2372.

[1] Wood argues that, because Gotcher challenges the disciplinary procedure which resulted in the loss of his good conduct time credits, his claim is governed by *Heck* because, if successful, it might affect the duration of his confinement. Wood's reliance on *Heck*, however, is misplaced. Gotcher's good conduct time credit claim is similar to the claim in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the *procedure* by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits). *See Heck*, 114 S. Ct. at 2370. "Nor is there any indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call

into question the lawfulness of the plaintiff's continuing confinement." *Id.* Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by *Heck*.

III.

We first address Gotcher's claimed liberty interest in receiving good conduct time credit. Pursuant to Washington's Sentencing Reform Act (SRA), inmates can earn an early release date through an earned early release program comprised of "earned time," *see* WAC § 137-28-006(5), and "good conduct time credits," *see* WAC § 137-28-006(6). "Good conduct time credits," which are at issue here, are defined as that portion of an inmate's potential sentence reduction gained by not receiving a "serious infraction." WAC § 137-28-006(6); *see also* DOC Policy No. 350.130 (defining "Good Conduct Time" as "[t]hat portion of time which an offender is eligible to earn by behaving pro-socially, i.e. not receiving serious infractions"). Thus, inmates who do not commit serious infractions are entitled to good conduct time credits, which can constitute 10 days of credit for every 30 days served. *See* DOC Policy No. 350.130.

These provisions were developed in response to Revised Code of Washington (RCW) § 72.09.130, which provides that the DOC "shall adopt" a system providing incentives for good conduct. Pursuant to RCW § 72.09.130, the good conduct time

credit program "shall be fair, measurable, and understandable to offenders, staff, and the public."

[2] Applying the "mandatory language/substantive predicate" due process analysis of *Helm* and *Thompson* to these facts, the district court held that Gotcher did not have a protectable liberty interest in the accrual of good conduct time credits. The Supreme Court, however, has since abandoned the "mandatory language/substantive predicate" analysis. *See Sandin v. Conner*, 115 S. Ct. 2293 (1995). Calling for a "return to the due process principles . . . correctly established and applied" in *Wolff v. McDonnell*, 418 U.S. 558 (1974), and *Meachum v. Fano*, 427 U.S. 215 (1976), the Court revised the due process analysis to be applied in prisoner § 1983 actions.

> Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

115 S. Ct. at 2300.

[3] For purposes of our due process analysis, the scheme of the good conduct time credit system in Washington appears to be indistinguishable from Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v.*

McDonnell found to confer a liberty interest on inmates. *See* 418 U.S. at 557. As the Court held in *Wolff*.

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing in "every conceivable case of government impairment of private interest." But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimal procedures appropriate under the circumstances and required by the Due Process Clause to insure that that state-created right is not arbitrarily abrogated.

Id. (citations omitted).

[4] One apparent distinction between this case and *Wolff*, however, is that the Washington DOC has issued a "Policy" stating that

> [i]t is the purpose of Department policy to guide the Department personnel in the conduct and performance of their duties. It is not the intent to grant offenders under the jurisdiction of the Department by policy a state-created liberty interest in addition to those rights guaranteed to offenders under the United States Constitution.

DOC Policy 100.100, at 1.

This DOC policy directive, however, is not controlling. As *Wolff* indicates, the focus is whether the State has created a right of "real substance." If it has done so, the State cannot then emasculate that right merely by issuing the disclaimer that it was not its intent to create a liberty interest. Moreover, the disclaimer in a DOC policy statement does not override the provisions of the Washington Administrative Code. And as the WAC states with regard to prison disciplinary procedures, its purpose is to "provide a standardized system consistent with constitutional due process for ascertaining whether [prisoner] misconduct" has occurred. WAC § 137-28-005(1).

[5] Thus, with regard to whether Gotcher possesses a liberty interest in accumulating good time credits, this case falls squarely under *Wolff*, which the Supreme Court noted in *Sandin* "correctly established and applied" due process principles in the prisoner liberty interest context. *See* 115 S. Ct. at 2300. Because the district court's ruling conflicts with *Wolff*, we reverse that ruling.

IV.

We next address Gotcher's claimed liberty interest in remaining free from disciplinary segregation. In *Sandin v. Conner*, the Supreme Court determined that a Hawaii inmate did not have a liberty interest in remaining free from disciplinary segregation because the inmate's 30 days in segregated

disciplinary confinement "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." 115 S. Ct. at 2301. The Court reached this conclusion after reviewing the record (the district court proceeding was resolved by summary judgment) and finding that, "with insignificant exceptions," the inmate's disciplinary segregation "mirrored those conditions imposed upon inmates in administrative and protective custody." *Id.* The Court supported this conclusion by discussing the various custodial conditions at the particular prison in question and by demonstrating that the plaintiff's segregation "did not work a major disruption in his environment." *Id.*

[6] In contrast to the detailed record in *Sandin*, the record in this appeal is insufficient for a determination of whether the disciplinary segregation at issue imposed an "atypical and significant hardship on Gotcher in relation to the ordinary incidents of prison life." *Sandin*, 115 S. Ct. at 2300. Because we will not affirm a dismissal under Fed. R. Civ. P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, *Everett & Jennings, Inc.*, 23 F.3d at 228, we reverse the district court on its dismissal of Gotcher's claim with regard to disciplinary segregation, and we remand for further proceedings.

V.

For the foregoing reasons, we REVERSE the district court's dismissal and REMAND for further proceedings.

Supreme Court, U. S.
FILED
MAR 22 1996
CLERK

ORIGINAL

No. 95-1352

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GARY EDWARDS AND TANA WOOD, *PETITIONERS*,

V.

JERRY BALISOK, *RESPONDENT*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Thomas H. Speedy Rice
Counsel of Record

Edward R. Montgomery*
* Limited license to practice under Washington State Bar Rule 9.

Gonzaga Law School
University Legal Assistance
N. 1220 Dakota Street
Spokane, WA 99202
(509)328-4220 x 3703
Counsel for Respondent

17 pp

QUESTION PRESENTED

I. When a prisoner's claim under 42 U.S.C. § 1983 seeks only damages, and does not implicate the results of a disciplinary hearing or durations of confinement, are 28 U.S.C. 2254(b) exhaustion of state remedy requirements applicable.

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF FACTS 2

PROCEDURAL HISTORY 3

ARGUMENT 4

A. *Heck v. Humphrey* provides an unambiguous guide for when a prisoner's claim for damages is cognizable under 42 U.S.C. § 1983. 5

B. Since the *Heck* decision the lower courts have had no difficulty determining when a prisoner may bring a cause of action for unconstitutional prison disciplinary procedures under 42 U.S.C. § 1983. 9

C. The Ninth Circuit did not adopt a per se rule that any claim seeking only damages is cognizable under § 1983 without exhaustion of State remedies. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Armento-Bey v. Harper,
68 F.3d 215 (8th Cir. 1995) 5, 9, 10

Best v. Kelly,
39 F.3d 328 (1994) 9

Georgevich v. Strauss,
772 F.2d 1078, (3rd Cir. 1985) 7

Gotcher v. Wood,
66 F.3d 1097 (9th Cir. 1995) 5, 9, 10

Hanson v. Heckel,
791 F.2d 93, (7th Cir. 1986) 7

Heck v. Humphrey,
114 S. Ct. 2364 (1994) 3, 4, 5, 8, 9, 10, 11

Hernandez v. Spencer,
780 F.2d 504 (5th Cir. 1986) 7

In Re Anderson,
112 Wn.2d 546, 772 P.2d 510 (1989) 11

In Re Johnston,
109 Wn. 2d 493, 745 P.2d 864 (1987) 11

Miller v. Indiana Dept of Corrections,
1996 WL 44390 at 1 (7th Cir. 1996) 5

Offet v. Solem,
823 F.2d 1256 (8th Cir. 1987) 6, 7, 8

Preiser v. Rodriguez,
411 U.S. 475 (1973) 4, 5, 6, 7

Superintendent, Massachusetts Correctional Institution, Walpole v. Hill,
472 U.S. 445 (1985) 10, 11

Williams v. Ward,
556 F.2d 1143 (1977) *cert. dismissed*, 434 U.S. 944 (1977) 7

Wolff v. McDonnell,
418 U.S. 539 (1974) 4, 5, 6, 7

Statutes and Regulations

28 U.S.C. 2254(b) ..... *passim*

42 U.S.C. § 1983 ..... *passim*

No. 95-1352

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GARY EDWARDS AND TANA WOOD, *Petitioners*,

v.

JERRY BALISOK, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Jerry Balisok, appellant in cause No. 95-35307 and 95-35310 before the United States Court of Appeals for the Ninth Circuit, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions below of the United States District Court for the Eastern District of Washington and the Court of Appeals for the Ninth Circuit are unreported. These opinions are reproduced and included in the Petition for Writ of Certiorari respectively as Appendix F and Appendix A.

STATEMENT OF THE FACTS

Respondent, Jerry Balisok, is an inmate at the Washington State Penitentiary (WSP). Because of his innate legal abilities, prison officers have marked Mr. Balisok as a "jail house attorney." Pet. for Cert. I-5. Prison officers at WSP have an unwritten policy to not date stamp witness statements received in support of jail house attorneys. Id. at I-4. The purpose of the unwritten policy is to allow prison officers to conceal exculpatory statements and then claim the document was submitted late or not submitted at all. *Id.*

On or about August 16, 1993, Mr. Balisok was charged with four infractions. *Id.* at I-3. On August 18, 1993, Mr. Balisok was notified that a disciplinary hearing would be conducted regarding the infractions. *Id.* In preparing for his defense, Mr. Balisok asked the hearing officer, Petitioner Edwards, to obtain a witness statements from inmate John Stein, and submit interrogatories to inmates Harris and Pulley. *Id.* at I-3, I-5. The hearing was later scheduled for September 2, 1993. *Id.* at I-3.

On August 19, 1993, inmate Stein signed the witness statement requested by Mr. Balisok and submitted it to WSP officials. *Id.* at I-4. The interrogatories were never submitted to inmates Harris or Pulley. *Id.* at I-6.

The infraction hearing was convened on September 2, 1993. *Id.* at I-3. During the hearing, Mr. Balisok requested the witness statement, and responses to interrogatories, be read into the record. *Id.* at I-4 - I-5. Officer Edwards told Mr. Balisok that inmate Stein did not submit a witness statement and that inmates Harris and Pulley refused to respond to the interrogatories. *Id.* Officer Edwards found Mr. Balisok guilty on all charges and sentenced him to ten days in

isolation, twenty days in administrative segregation and revoked 30 days earned good time credit. *Id.* at I-6.

On October 7, 1993, Mr. Balisok reviewed his central file and discovered that inmate Stein did in fact submit a witness statement. *Id.* at I-4. Inmate Stein's statement was hand written and dated August 19, 1993. *Id.* Mr. Balisok also discovered that WSP officers did not submit his interrogatories to inmates Harris or Pulley. *Id.* at I-6.

Mr. Balisok was found guilty of the infractions. He submitted an eight page appeal to prison Superintendent Wood, Petitioner herein, detailing the procedural defects surrounding the hearing. *Id.* at I-7. The appeal was rejected and returned to Mr. Balisok because it was too long. However, the appeal instruction do not set any specific page limit on the length of an appeal, rather the instructions merely suggest that an appeal "should" be two pages long. *Id.* Despite the suggestive, as opposed to mandatory, language of the appeal instructions, Mr. Balisok's appeal was never considered. *Id.* at I-7 - I-8.

PROCEDURAL HISTORY

In January 1994, Mr. Balisok filed a complaint in the United States District Court for the Eastern District of Washington against Petitioners Edwards and Wood under 42 U.S.C. § 1983 for violating of his due process rights under the Fourteenth Amendment to the United States Constitution. Pet. for Cert. App. H.

In response to this Court's holding in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), Mr. Balisok amended his Complaint in October, 1994. Pet. for Cert. App. I. In his amended complaint, Mr. Balisok alleged the Petitioner Edwards violated his due process rights by refusing to produce the witness statement of inmate Stein, failing to submit the interrogatories to inmates

Harris and Pulley, failing to specify what facts or evidence supported the finding of guilt, and failing to state grounds upon which to deny his appeal. *Id.* at I-9. Mr. Balisok alleges Petitioner Wood violated his due process rights by not accepting his appeal from the infraction hearing. *Id.* at I-9 - I-10. For relief, Mr. Balisok requested declaratory judgment that the procedures used by the Petitioner violated his constitutional right to due process, injunctive relief to prevent similar conduct in the future, and compensatory and punitive damages. *Id.* at I-10. Mr. Balisok specifically omitted any request for restoration of lost good time credits.

In February 1995, the District Court dismissed Mr. Balisok's complaint reasoning, "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid. Pet. for Cert. at F-11. In a one page, unpublished, memorandum decision, the Court of Appeals for the Ninth Circuit reversed the District Court's decision reasoning Mr. Balisok's claim under § 1983 did not necessarily call into question the lawfulness of his conviction and therefore was not barred by *Heck*. Pet. for Cert. at A-2.

ARGUMENT

Petitioner argues that review of this case is necessary two reasons: First, Petitioners believe this Court's decision in *Heck* is unclear and therefore did not resolve the conflict in the Circuits resulting from *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and *Wolff v. Mcdonnell*, 418 U.S. 539 (1974). Pet. for Cert. at 10, 13-17. Second, Petitioners argue that the appellate courts below have incorrectly adopted a per se rule "that a prisoner's challenge to a specific disciplinary hearing will never 'call into question' the resulting loss of good time as long as the

prisoner indicates that he is only challenging the procedures, and not the result, of the hearing." Pet. for Cert. at 17-18. Both of these arguments are incorrect.

Since this Court's unambiguous decision in *Heck* there is no indication in the opinions of the two Circuits to address the issue raised by Petitioners' Writ of any continuing difficulty or confusion about the availability of § 1983 relief for a prisoner seeking damages resulting from unconstitutional prison disciplinary procedures. In addressing the issue raised by Petitioners' Writ, the courts have adopted the correct rule for determining when a complaint is one for damages or is in fact an attack on the type or duration of confinement. *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995); *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995). See also, *Miller v. Indiana Dept of Corrections*, 1996 WL 44390 at 1 (7th Cir. 1996) (citing *Gotcher* and *Armento-Bey* with approval). Indeed, in both *Gotcher* and *Armento-Bey*, the courts rejected a per se rule to determine the availability of § 1983. Instead the courts correctly concluded the proper test regarding the availability of § 1983 prior to exhaustion of state remedies is whether the claim, if successful, would necessarily invalidate the underlying conviction. *Armento-Bey*, 68 F.3d at 216; *Gotcher*, 66 F.3d at 1099. These cases demonstrate that *Heck* has put to rest any confusion regarding the proper application of *Preiser* and *Wolff*. Accordingly, Petitioners' Writ for review of the unpublished Ninth Circuit memorandum decision below should be denied.

A. *Heck v. Humphrey* provides an unambiguous guide for when a prisoner's claim for damages is cognizable under 42 U.S.C. § 1983.

Contrary to the Petitioners' assertion, *Heck* has settled the conflict in the Circuits pertaining to the issue raised by Petitioners' Writ of Certiorari. Prior to the *Heck* decision, the lower courts had difficulty reconciling this Court's previous holdings in *Preiser* and *Wolff*. In *Preiser*, the plaintiff alleged the defendants unconstitutionally deprived him of good time credits and brought

suit under § 1983 seeking injunctive relief to restore the lost credits. *Preiser*, 411 U.S. at 476-77. The Court dismissed plaintiff's claim for injunctive relief because the claim was in essence a challenge to the fact or duration of confinement and therefore the exclusive remedy is habeas corpus with the necessary exhaustion requirement. *Id.* at 500. The policy driving the *Preiser* decision was concern of comity--that the state should have the first opportunity to corrects its own errors. *Id.* at 491-92.

One year later, this Court handed down the *Wolff* decision. In that case, the plaintiff prisoners sought damages and injunctive relief for unconstitutional prison disciplinary procedures. *Wolff*, 418 U.S. at 442-43. In *Wolff*, the Court reasoned that habeas was not an appropriate or available remedy for damages and therefore allowed the plaintiffs to pursue a cause of action under § 1983 without first exhausting state court remedies. *Id.* at 554. Specifically, the Court held "it was appropriate for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time credits." *Id.* at 555. The policy driving the *Wolff* decision appeared to be preserving the purpose of § 1983 to provide federal redress for arbitrary and oppressive abuses of government power. *Offet v. Solem*, 823 F.2d 1256, 1263 (8th Cir. 1987) (Arnold J., dissenting).

The confusion in the lower courts stemmed largely from the dicta in *Preiser* wherein the Court states, "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or speedy release -- the traditional purpose of habeas corpus." *Preiser*, 411 U.S. at 494. The problems that

language created was evidenced by the Eight Circuit decision in *Offet*. Relying exclusively on the language of *Preiser*, the majority concluded the *Preiser* dicta establishes a bright line rule that any challenge to prison disciplinary proceedings under § 1983, regardless of the relief sought must be proceeded by exhaustion of state remedies. *Offet*, 823 F.2d at 1258. Conversely, Justice Arnold in his dissent, interpreted this passage as bright line, although arbitrary, rule that the availability of § 1983 for damages resulting from unconstitutional disciplinary procedures rests solely with the type of relief requested. *Id.* 1261. In other words, if a plaintiff sought only damages or prospective relief, he could proceed under § 1983 without first exhausting his state remedies. On the other hand, if the plaintiff sought restoration of good time credits, his remedy would necessarily be a Writ of Habeas Corpus.

The courts also had difficulty determining when a claim under § 1983 was an attack on the fact or duration of confinement requiring exhaustion under *Preiser*, or whether it was truly one for damages not requiring state remedy exhaustion under *Wolff*. The Second and Third Circuits believed the distinction rested with whether the plaintiff was challenging the manner by which the prison authorities reach their decision and not the outcome of their decision. *Georgevich v. Strauss*, 772 F.2d 1078, 1086-87 (3rd Cir. 1985); *Williams v. Ward*, 556 F.2d 1143, 1050-51 (2nd Cir. 1977) *cert. dismissed*, 434 U.S. 944 (1977). The Fifth Circuit drew the distinction "where the factual allegations of the complaint *could* give rise to habeas relief or to civil rights remedies." *Hernandez v. Spencer*, 780 F.2d 504, 505 (5th Cir. 1986). The Seventh Circuit adopted a more restrictive approach drawing the distinction with whether there is a direct and specific relationship between the challenged conduct and the prisoner's release date. *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986). The Eighth Circuit dismissed *Wolff* entirely as being

inconstant with *Preiser* and adopted a per se rule that a prisoner must exhaust the available state remedies before bring a claim under § 1983 regardless of whether the relief sough is for restoration of good time credits or damages. *Offet*, 823 F.2d at 1258. The dissent in that case believed *Preiser* and *Wolff* required a per se rule that exhaustion was never required if the relief sought was only for damages. *Id.* at 1262.

This Court completely resolved the confusion in 1994 with *Heck v. Humphrey*. In *Heck*, this Court defined the proper scope and application of *Preiser*. *Heck*, 114 S.Ct. at 2369-70. The Court explained *Preiser* is limited to the holding that habeas corpus is the exclusive remedy for any claim challenging the fact or duration of confinement and nothing more. *Id.* In doing so, this Court dismissed as unreliable the dicta in *Preiser* and noted that any reference to *Preiser* as a guide for an issue of damages is misplaced. *Id.* By explaining the proper scope of *Preiser* and dismissing the problematic dicta, this Court remedied the majority of the confusion in the lower courts.

The Court also clarified and affirmed *Wolff's* holding. The Court explained that a claim for damages for using the wrong procedures, as opposed to reaching the wrong result, is cognizable under § 1983 without habeas exhaustion provided that the claim would not "necessarily vitiate the denial of good time credits." *Id.* at 2370. By setting forth the proper test to determine when a claim under § 1983 requires exhaustion of state remedies the Court resolved any remaining confusion the lower court may have had prior to *Heck*. The *Heck* decision provides a simple test for the lower courts to determine when a claim under § 1983 is an attack on the fact or duration of confinement, or one seeking only damages. As a result, the lower courts now have a clear and unambiguous guide to determine when a cause of action exists under § 1983 for damages

stemming from unconstitutional prison disciplinary procedures or when the prisoner must first exhaust his state remedies.

B. Since the *Heck* decision the lower courts have had no difficulty determining when a prisoner may bring a cause of action for unconstitutional prison disciplinary procedures under 42 U.S.C. § 1983.

Petitioners' argument that there is continuing confusion with this Court's holdings in *Preiser* and *Wolff* after the *Heck* decision is without merit or support. Petitioners' cite to ten Circuit Court cases as evidence of continuing confusion. Pet. for Cert. at 16-21. Seven of those ten cases were decided before *Heck* and are irrelevant for post-*Heck* analysis. The remaining three post-*Heck* cases cited are *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994), *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995) and *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995).

Petitioners' reliance on the *Best* decision in support of their argument of continuing confusion in the lower courts after *Heck* is in error. In *Best*, while the court affirmed the District Court's decision to dismiss plaintiff's claim under § 1983 insofar as it related to the restoration of good time credits, the court specifically expressed no opinion regarding the plaintiff's claims seeking damages. *Best*, 39 F.3d at 331. The D.C. Circuit has never addressed the issue raised by the Petition for Certiorari, nor has it given any indication that the court is having trouble interpreting the plain language of *Heck*.

The other two cases Petitioners rely on as evidence of continuing confusion in the lower courts after *Heck* are *Gotcher* and *Armento-Bey*. Although both *Gotcher* and *Armento-Bey* are on point, and decided after *Heck*, they demonstrate consistency in the lower courts and not confusion. Relying on *Heck* and *Wolff*, both courts explicitly adopted the proper rule set forth in *Heck* that a claim under § 1983 seeking damages is cognizable if the claim would not necessarily

invalidate the underlying conviction. *Gotcher*, 66 F.3d at 1099; *Armento-Bey*, 68 F.3d at 216. Both of these cases are consistent with each other and consistent with this Court's decision in *Heck*.

C. The Ninth Circuit did not adopt a per se rule that any claim seeking only damages is cognizable under § 1983 without exhaustion of state remedies

Relying on its previous holding in *Gotcher*, the Ninth Circuit reinstated Mr. Balisok's claim under § 1983, holding the claim "did not call into question the lawfulness of his continuing confinement" and therefore, was not barred by this Court's decision in *Heck*. Pet. for Cert. at A-2. Nothing in the one-page memorandum decision indicates that the Ninth Circuit has adopted a per se rule that a claim seeking only damages could proceed regardless of whether the claim demonstrates the invalidity of the disciplinary sanctions. *Id.* Indeed, the court specifically based its decision on *Heck* and concluded that allowing Mr. Balisok's claim to proceed under § 1983 would not necessarily invalidate the predicate infractions. *Id.*

In applying the correct standard for determining whether a claim is cognizable under § 1983, the Ninth Circuit in this case, in *Gotcher*, and the Eighth Circuit in *Armento-Bey*, reached the correct result. *Heck* makes it clear that a claim under § 1983 for damages resulting from unconstitutional prison disciplinary procedures may only proceed without requiring exhaustion of state remedies when a favorable determination of such a claim would not necessarily invalidate the underlying conviction. *Heck*, 114 S. Ct. at 2370. As this Court held in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985) disciplinary sanctions resulting in the loss of good time credits will comport with the minimum requirement of due process provided the decision is supported by "some evidence." *Id.* Any

action challenging the fact or duration of confinement involves the review of the entire record. *Id.* at 455-56. Upon review of the entire record, if the court finds there is some evidence to support the conviction, the decision will stand. *Id.* at 455. Accordingly, under the *Heck* rule, a claim under § 1983 will invalidate the infraction decision resulting in the loss of good time credit only if upon review of the entire record, the claim would demonstrate there was *no* evidence to support the infraction.

In the State of Washington, the courts will uphold prison infractions decision which are only supported by some evidence. *In Re Anderson*, 112 Wn.2d 546, 772 P.2d 510 (1989); *In Re Johnston*, 109 Wn. 2d 493, 745 P.2d 864 (1987). In both of the those cases, the courts held that while the evidence presented may not have been sufficient in a non-prison setting, the minimal evidence presented by the prison officials satisfied the some evidence rule and therefore affirmed the convictions. *Anderson*, 112 Wn. 2d at 550; *Johnston*, 109 Wn. 2d at 499.

In the present case, there is some evidence by which the state court could affirm the decision to infract Mr. Balisok. Specifically, the investigation of Petitioner Edwards. Pet. for Cert. App. K. Accordingly, upon review, regardless of the procedural defects, a state court could affirm Mr. Balisok's conviction based on the some evidence rule. Therefore, even if Mr. Balisok's claim under § 1983 is successful, it will not necessarily invalidate the underlying conviction.

CONCLUSION

For there reasons, the Petition for Writ of Certiorari, should be denied.

Respectfully submitted,

Thomas H. Speedy Rice
Counsel of Record

Edward R. Montgomery*
* Limited license to practice under Washington State Bar Rule 9.

Gonzaga University
University Legal Assistance
N. 1220 Dakota Street
Spokane, WA 99202
(509)328-4220 x 3703
Counsel for Respondent

(3)

Supreme Court, U.S.
FILED
APR 3 1996
CLERK

NO. 95-1352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TALIS MERLE ABOLINS
JOHN SCOTT BLONIEN*
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
Assistant Attorneys General
*Counsel of Record**
Counsel for Petitioners

P. O. Box 40116
Olympia, Washington 98504-0116
(360) 586-1445

April 1996

13pp

TABLE OF CONTENTS

A. The Respondent Concedes That Petitioners Have Identified A Conflict Among The Circuit Courts Of Appeals. 1

B. *Heck v. Humphrey* Neither Resolved Nor Addressed The Conflict And Confusion Stemming From *Wolff* And *Preiser*. 1

C. Since *Heck v. Humphrey*, Federal Courts Continue To Struggle With Jurisdiction Over Challenges To Prison Discipline. 4

D. Respondent's Due Process Claim Calls Into Question His Loss of Good-Time Credits. 6

TABLE OF AUTHORITIES

Cases	Page
Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995)	4, 5
Broussard v. Johnson, ___F. Supp. ___, 1996 WL 115450 (E.D. Tex. 1996)	4
Caldwell v. Line, 679 F.2d 494 (5th Cir. 1982)	2
Campbell v. Henman, 931 F.2d 1212 (7th Cir. 1991)	7
Clark v. Thompson, 960 F.2d 663 (7th Cir. 1992)	3
Cochrell v. Purkett, 1996 WL 78179 (8th Cir. 1996)	4, 6
Gibbons v. Higgins, 1995 WL 761743 (7th Cir. 1995)	1, 4
Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995)	4
Hayes v. Thompson, 637 F.2d 483 (7th Cir. 1980)	7
Heck v. Humphrey, 512 U.S. ___, 114 S. Ct. 2364 (1994)	1, 2, 4-6
Hrbek v. State, 478 N.W.2d 617 (Iowa 1991)	7

In re Anderson, 112 Wn.2d 546 P.2d 510 (1989)	6, 7
In re Burton, _ Wn. App. _, 910 P.2d 1295 (1996)	7
In re Johnston, 109 Wn.2d 493, 745 P.2d 864 (1987)	6
In re Plunkett, 57 Wn. App. 230, 788 P.2d 1090 (1990)	7
In re Reismiller, 101 Wn.2d 291, 678 P.2d 323 (1984)	7
Kingsley v. Bureau of Prisons, 937 F.2d 26 (2nd Cir. 1991)	7
Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995)	2
Miller v. Indiana Dept. Of Corrections, 75 F.3d 330 (7th Cir. 1996)	4, 5
Morgan v. Ellerthorpe, 785 F.Supp. 295 (D.R.I. 1992)	7
Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987)	2, 3
Preiser v. Rodriguez, 411 U.S. 475 (1973)	1-3
Richmond v. Duke, 909 F. Supp. 626 (E.D. Ark. 1995)	2, 4, 5

Sandin v. Conner,
_ U.S. __, 115 S.Ct. 2293 (1995) 3

Serio v. Members of Louisiana State Board of Pardons,
821 F.2d 1112 (5th Cir. 1987) 3, 4

Wells v. Bonner,
45 F.3d 90 (5th Cir. 1995) 2

Williams v. Godinez,
1996 WL 124463 (N.D.Ill. 1996) 4, 5

Williams v. Hill,
74 F.3d 1339 (D.C. Cir. 1996) 2

Wolff v. McDonnell,
418 U.S. 539 (1974) 1, 7

Wood v. Gotcher,
Supreme Court No. 95-1385 (cert. pending) 3

A. The Respondent Concedes That Petitioners Have Identified A Conflict Among The Circuit Courts Of Appeals.

In our Petition, we asked this Court to accept review in order to resolve continuing conflict and confusion in the circuit courts. The conflict arises from the tension between this Court's decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and *Wolff v. McDonnell*, 418 U.S. 539 (1974). In response, Respondent concedes that this Court's decisions in *Preiser* and *Wolff* have resulted in a "conflict in the Circuits pertaining to the issue raised" in this case. Respondent's Brief, at 5. Respondent also concedes that these cases have led to "problems" and "confusion in the lower courts", noting that the federal courts have "had difficulty determining when a claim under § 1983 was an attack on the fact or duration of confinement requiring exhaustion under *Preiser*, or whether it was truly one for damages not requiring state remedy exhaustion under *Wolff*." See Respondent's Brief at 5 - 8.

B. *Heck v. Humphrey* Neither Resolved Nor Addressed The Conflict And Confusion Stemming From *Wolff* And *Preiser*.

Having conceded the conflict, Respondent is left to argue that the conflict was "completely resolved" with a "simple test" in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). Respondent's Brief, at 8. *Heck*'s simple test did not resolve the conflict.[1]

---

[1]According to Respondent, *Heck* has clarified *Wolff* as a case that allows any prisoner to bypass habeas corpus with a narrowly drafted challenge to procedures of a specific disciplinary hearing, where the right to challenge the result is reserved for another case. Respondent's Brief, at 3-4, and 8. In an unpublished decision, the Seventh Circuit explicitly recognized that there was "a debate" as to "whether (or how) *Heck v. Humphrey* might apply in prison disciplinary cases." *Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished) (Posner, J., writing for the three-judge panel).

Heck has provided a simple test for cases, such as Heck's, where the civil rights claim will "necessarily" invalidate a criminal conviction. *Id.* at 2372. Because there was no question that Heck's challenge would have necessarily invalidated the fact of his confinement, the Court was able to resolve the claim based upon principles of tort law. The Court had no need to address the principles of federal-state comity that lie at the heart of *Preiser* and the exhaustion requirement itself. *See Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996); *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987).

But *Heck* did not provide a simple test for cases, such as this one, that are likely to call a prisoner's loss of good-time credits into question. The Court merely indicated that such cases may proceed if the federal court "determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff". *Heck*, 114 S. Ct. at 2372 (emphasis in original).[2] This is the determination that federal courts will continue to struggle with whenever a prisoner labels his complaint as a civil rights challenge to procedures, rather than the outcome, of a disciplinary proceeding resulting in lost good-time credits.[3]

---

[2]*Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995); *Wells v. Bonner*, 45 F.3d 90, 94 (5th Cir. 1995); *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995); *see also Caldwell v. Line*, 679 F.2d 494, 496 (5th Cir. 1982)(citations omitted) (holding that "the federal court must examine the basis of the complaint and determine whether the claim, if proven, would factually undermine or conflict" with the basis for confinement).

[3]Unlike Respondent, Heck was unable to drop his claim for relief from unlawful confinement for the sole purpose of circumventing the exhaustion requirement set forth in the habeas corpus statutes. This Court refused to allow it. *Heck*, 2368, n.2. Respondent admits he dropped his claim for good-time credits in response to *Heck*: "In response to this Court's holding in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), Mr. Balisok amended his Complaint. ... [and] specifically omitted any request for restoration of lost good time credits." Respondent's Brief, at 3-4. He makes no effort to address the absurdity of a rule that would reward manipulative inmates who strive to bypass exhaustion, and punish unsophisticated inmates who unwittingly fail to specify a claim for early release. *See* Petition, at 22 and compare *Wood v. Gotcher*, Supreme Court No. 95-1385 (cert. pending).

The Eighth Circuit concisely described the unique problem as follows:

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us no answer to the concerns of federalism that cases such as this one raise.

Offet v. Solem, 823 F.2d 1256, 1259 (8th Cir. 1987) (emphasis supplied); *see also Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116 (5th Cir. 1987); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992). Because Heck directly and necessarily challenged the outcome of his criminal trial, his case provides "no answer to the concerns of federalism" that cases such as Respondent's raise. *See Offet*, 823 F.2d at 1259.[4]

---

[4]In *Sandin v. Conner*, this Court clarified the threshold standard for state-created liberty interests in order to reduce federal judicial involvement in the "day-to-day management of prisons", and to afford "appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293, 2299 (1995). Under this standard, prisoner due process claims are dismissed if they fail to identify an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.*, 115 S.Ct. at 2300. In light of *Sandin*, it is ironic that, because a prisoner has momentarily denied any interest in the return of lost good-time credits, the Ninth Circuit will require federal judicial involvement, and deprive states of their "first opportunity to correct the errors made in the internal administration of their prisons". *Preiser*, 411 U.S. at 492.

C. Since *Heck v. Humphrey*, Federal Courts Continue To Struggle With Jurisdiction Over Challenges To Prison Discipline.

Respondent's assertion that *Heck* has resolved the conflict and confusion is further refuted by cases decided since *Heck*. *Miller v. Indiana Dept. Of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Broussard v. Johnson*, ___F. Supp. ___, 1996 WL 115450, at 2 (E.D. Tex. 1996), *citing Serio*; *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995). *See also Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished); *Cochrell v. Purkett*, 1996 WL 78179 (8th Cir. 1996) (unpublished); *Williams v. Godinez*, 1996 WL 124463 (N.D.Ill. 1996) (unpublished).

In *Miller*, an Indiana inmate brought a civil rights suit for damages, claiming that he was denied a classification that would have entitled him to good-time credits. Straining to avoid a conflict with *Gotcher* and *Armento-Bey*, the court incorrectly presumed that these civil rights claims went forward because the inmates "conceded that the correctional system had reached the right result".[5] *Miller*, 75 F.3d at 331. Because Miller did not concede that his procedural challenge was harmless, his case was properly dismissed:

> The issue, we emphasize, is not the relief sought, but the ground of the challenge. Although the only remedy that Miller seeks is damages, he claims that as a result of the alleged

[5]The Seventh Circuit's attempt to distinguish these cases was unsuccessful because in *Gotcher* the inmate specifically claimed that "his loss of good conduct time credits . . . constituted compensable violations of his due process rights." *Gotcher v. Wood*, 66 F.3d 1097, 1098 (9th Cir. 1995). Further, like Respondent, Armento-Bey never conceded that the loss of good-time credits was proper. *Armento-Bey*, 68 F.3d 215, 216 (8th Cir. 1995) (rather than concede a proper result, Armento-Bey only limited his claim for relief).

> denial of due process he was deprived of good-time credits to which he was entitled. So he is challenging the lawfulness of his continued confinement, and having failed to vindicate the challenge through the proper means he is barred from seeking vindication in this suit for damages.

Id. at 331. Unlike Miller, Respondent explicitly reserves the right to challenge his loss of good-time credits. App. F-4. If Respondent were in the Seventh Circuit, he would "not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement." *Miller*, 75 F.3d at 331.

Similarly, in *Richmond*, the court noted the "basic dichotomy of *Heck*" between challenges that necessarily invalidate confinement, and challenges to procedures that are only allowed to proceed if they "would not be sufficient to undermine" the confinement. *Richmond*, 909 F.Supp. at 629. The court found it "difficult (though not impossible) to reconcile the decision in *Armento-Bey* with the dichotomy inherent in the *Heck* decision." *Id.* at n.8. The only way the court could achieve this reconciliation was by incorrectly assuming, like the Seventh Circuit in *Miller*, that Armento-Bey conceded that the procedural violation was harmless error. *Id.* Because it was "arguable" that Richmond's disciplinary sanction could not be allowed to stand, the court dismissed the claim. *Id.* at 633.

In *Williams v. Godinez*, the court reviewed a claim like Respondent's, where the "plaintiff seeks damages and injunctive relief that does not include restoration of good time". *Williams*, 1996 WL 124463, at 1. Despite this narrow request for relief, the court dismissed the case because "it is evident that any favorable ruling would by implication entitle plaintiff to return of the good time credits taken from him as a result of the

disciplinary hearings." *Id.*

In *Cochrell*, the inmate alleged that he was unconstitutionally denied parole based upon his race. Like Respondent, Cochrell challenged unlawful practices without challenging the result of those practices. For relief, Cochrell merely sought a declaration that the Defendants' actions were unconstitutional, and to "enjoin (defendants') illegal and unconstitutional practices". *Cochrell*, 1996 WL 78179, at 1. The Eighth Circuit affirmed the district court because "the essence of Cochrell's claim was that his parole has been unconstitutionally delayed, and that he was attacking the duration of his confinement and seeking an immediate or speedier release." *Id.*

The foregoing decisions directly contradict Respondent's assertion that *Heck* resolved the issue in this case with a "simple test" that allows prisoners challenging procedures of prison disciplinary proceedings to sue under § 1983. Until this issue is resolved, federal courts will continue to reach conflicting decisions on the jurisdictional question presented by prisoners who challenge such procedures.

D. Respondent's Due Process Claim Calls Into Question His Loss of Good-Time Credits.

According to Respondent, his due process claim does not implicate lost good-time credits because, regardless of the due process violation, Washington courts will uphold his disciplinary sanction unless there is "no evidence" in the record to support it. See Respondent's Brief at 10-11, *citing In re Anderson*, 112 Wn.2d 546, 772 P.2d 510 (1989); *In re Johnston*, 109 Wn.2d 493, 745 P.2d 864 (1987). To the contrary, Respondent's claim that he was unlawfully denied an opportunity to present exculpatory evidence, if proven, would result in a reversal of the disciplinary hearing officer's decision and sanction, despite the

existence of evidence in the disciplinary hearing record.[6]

Washington courts will grant a petition for relief from unlawful restraint if a prison disciplinary proceeding is "so arbitrary and capricious that it denied the inmate a fundamentally fair hearing." *Anderson*, 112 Wn.2d at 549, *citing In re Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984), *citing Wolff*. Such a hearing "is not arbitrary and capricious if the petitioner was afforded the minimum due process protections" set forth in *Wolff*. *In re Burton*, _ Wn. App. _, 910 P.2d 1295 (1996)(citing *Reismiller*, 101 Wn.2d at 294); *see, e.g., In re Plunkett*, 57 Wn. App. 230, 237, 788 P.2d 1090 (1990), (the Washington appellate court held that the decision by the prison official to hold the inmate's disciplinary hearing over the telephone "was not 'willful and unreasoning', and thus was not arbitrary and capricious").

If Respondent proves in federal court that the Defendants violated *Wolff* by maliciously excluding exculpatory evidence at his hearing, a Washington State court would be forced to conclude that Respondent's hearing was arbitrary and capricious, and his loss of good-time credits would not stand.

* * *
* * *
* * *
* * *
* * *
* * *
* * *

---

[6]Like Washington courts, the federal courts will reverse the decisions and sanctions of prison disciplinary officers where the prisoner is denied an opportunity to prevent exculpatory evidence. *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 31 (2nd Cir. 1991); *Campbell v. Henman*, 931 F.2d 1212, 1215 (7th Cir. 1991); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980); *Morgan v. Ellerthorpe*, 785 F.Supp. 295, 303 (D.R.I. 1992); *see also Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991) ("An unjustified refusal to permit live testimony of a defense witness ... will warrant reversal").

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Talis Merle Abolins
John Scott Blonien*
William Berggren Collins
Mary E. Fairhurst
Assistant Attorneys General
Counsel of Record*
Counsel for Petitioners

April 1996

Supreme Court, U.S.
FILED
JUN 28 1996
CLERK

NO. 95-1352

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

vs.

JERRY B. BALISOK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

KATHLEEN D. MIX*
TALIS MERLE ABOLINS
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
Assistant Attorneys General
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445
Counsel for Petitioner

THOMAS H. SPEEDY RICE*
GEORGE A. CRITCHLOW

Gonzaga Law School
University Legal Assistance
N. 1220 Dakota Street
Spokane, WA 99202
(509)328-4220 x 3703
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED FEB. 20, 1996
CERTIORARI GRANTED APRIL 29, 1996

TABLE OF CONTENTS

	PAGE
List of Relevant Docket Entries	1
Plaintiff's Final Witness List, filed April 19, 1994	3
Memorandum Decision of the Court of Appeals, filed November 22, 1995	9

The following parts of the record have been omitted in printing this Joint Appendix because they appear in the following appendices to the printed Petition for Certiorari:

Civil Rights Complaint, filed January 26, 1994	H-1
Plaintiff's Amended Complaint, filed October 28, 1994	I-1
Order for Interlineation, filed January 19, 1995	J-1
Order Denying Defendants' Motion to Dismiss and Staying Action, filed February 6, 1995	F-1

LIST OF RELEVANT DOCKET ENTRIES

Document	Docket No.
Civil Rights Complaint With a Jury Demand	1
Order to Proceed *In Forma Pauperis*, Order Dismissing One Allegation and Order of Service	2
Defendants' Motion for Stay of Proceedings	12
Memorandum in Support of Defendants' Motion for Stay of Proceedings	13
Officer's Report, Exhibit 2, Memorandum in Support of Defendants' Motion for Stay of Proceedings	13
Disciplinary Hearing Minutes and Findings, Exhibit 3, Memorandum in in Support of Defendants' Motion for Stay of Proceedings	13
Plaintiff's Response to Defendants' Motion for Stay of Proceedings	16
Scheduling Order	21
Plaintiff's Final Witness List	23
Defendant's Witness List	25

Order Staying Defendants' Motion to Stay 26

Defendants' Motion to Dismiss 33

Defendants' Memorandum in Support of Motion to Dismiss 34

Order Appointing, *Pro Hac Vice*, Thomas H. Speedy Rice and the Gonzaga University Legal Assistance Program 37

Plaintiff's Memorandum in Response to Defendants' Motion to Dismiss 39

Plaintiff's Amended Complaint and Demand for Jury Trial 40

Reply in Support of Defendants' Motion to Dismiss 42

Order for Interlineation 46

Order Denying Defendants' Motion to Dismiss and Staying Action 47

Order Denying Plaintiff's Motion for Reconsideration 53

NINTH CIRCUIT ENTRIES:

Memorandum, filed November 22, 1995

[Filed]
[April 19, 1994]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-416-JLQ

FINAL WITNESS LIST

JERRY B. BALISOK,

PLAINTIFF,

v.

GARY EDWARDS AND TANA WOOD,

DEFENDANTS.

Pursuant to the Court's Scheduling Order of April 9, 1994, Jerry B. Balisok, Plaintiff in the above entitled matter, hereby submits his Fianl Witness List.

FINAL WITNESS LIST

1. Ms. Lorraine Lee, Attorney
Washington Appellate Defender Association
500 Union St. suite 500
Seattle, Wa 98104

Ms. Lee will testify that she was Plaintiff's appellate attorney, that Plaintiff's conviction was overturned by the Washington Court of Appeals, Division I, on December 31, 1992; no new order was issued by a Washington court reinstating Plaintiff's conviction until January, 1994; and that Plaintiff was a pretrial detainee from December 31, 1992 until January, 1994.

2. Gary Edwards
PO Box 520
Walla Walla, Wa 99362

Defendant Edwards will testify that he refused to take proper witness statements; failed to specify which documents he relied upon to find Plaintiff guilty of four major infractions; concealed inmate John Stein's witness statement from Plaintiff; that he withheld exculpatory evidence that I&I had discovered that Plaintiff's accuser, inmate John Adams DOC #287645, was lying about Plaintiff's alleged involvement in any misconduct and that I&I had confronted Adams with this exculpatory evidence even before Plaintiff was sent to IMU.

3. Tana wood
PO Box 520
Walla Walla, WA 99362

Defendant Wood will testify that she refused to overturn Plaintiff's infractions and restore his goodtime and earned time credits after Plaintiff pointed out to her in a letter that inmate John Stein's witness statement was in Plaintiff's central file and that it had been withheld by defendant Edwards at Plaintiff s disciplinary hearing.

4. Donald Hemphill, Inmate
Washington State Penitentiary
PO Box 520
Walla Walla, WA 99362

Mr. Hemphill will testify that he has personal knowledge that the Washington State penitenti ry administration had knowledge prior to Plaintiff being sent to IMU or being found guilty of four major infractions that inmate John Adams was lying about Plaintiff's misconduct or being involved in any way w th the four major infractions.

5. Mrs. Ruth Greenway, Instructor
Walla Walla Community College-North Campus
Washington State enitentiary
PO Box 520
Walla Walla, Wa 99362

Mrs. Greenway will testify that Plaintiff told her that her teacher's aide might have given inmate John Adams the answers to a math exam. and plaintiff did not tell her that her teacher's aide did give the answers to Adams.

6. JOHN STEIN - 955827
Clallam Bay Correction Center
Rt. 63, Box 5000
Clallam Bay, Wa 98326-9775

Mr. Stein will testify that he has personal knowledge that the Washington State Penitentiary administration had knowledge that inmate John Adams had fabricated his accusations against Plaintiff before Plaintiff was found guilty of four major infractions.

7. John Adams - 287645
McNeil Isla d Correction Center
PO Box 900, MS WT-01
Steilacoom, Wa 98388-0900

Mr. Adams will testify that he was told by Washington State Penitentiary personnel that they knew that he had falsely accused Plaintiff of wrongdoing in connection with Plaintiff's four major infractions before Plaintiff went to IMU or was found guilty of the infractions at his disciplinary hearing.

8. Ken Jurgenson
PO Box 520
Walla Walla, Wa 99362

Mr. Jurgenson will testify that Plaintiff told him that Plaintiff was a pretrial detainee before Plaintiff was sent to IMU and before Plaintiff was infracted and found guilty of four major infractions.

9. Charles Harris - 914954
Washington State Penitentiary
PO Box 520
Walla Walla, Wa 99362

Mr. Harris will testify that John Adams sat with him and Plaintiff and inmate Sherman Pulley. That he was never asked about this by WSP staff.

10. Sherman Pulley, Inmate
Washington State Penitentiary
PO Box 520
Walla Walla, Wa 99362

Mr. Pulley will testify to the same as Mr. Harris.

11. John Massaro
PO Box 520
Walla Walla, Wa 99362

Mr. Massaro will testify that Plaintiff submitted an appeal to his infractions, that the appeal was returned to Plaintiff because it was too long, that his records show that Plaintiff did not submit a revised version. of his appeal.

12. Sue Schuler
PO Box 520
Walla Walla, Wa 99362

Ms. Schuler will testify that she is the records keeper and that she does maintain Plaintiff's Central File at Washington State Penitentiary, that contained within Plaintiff's Central File is the appeal that Plaintiff resubmitted with the notes that Plaintiff submitted with his resubmitted appeal, Mr. Pulley's witness statement, Mr. Stein's witness statement, Ken Jurgenson's memorandum marked "NOT FOR DISCLOSURE," and all the different documents used as evidence against Plaintiff in his disciplinary hearing of September 2, 1993.

13. Donald Holevinski
PO Box 520
Walla Walla, Wa 99362

Mr. Holevinski will testify that he told Plaintiff during an interview in 1994 that in Plaintiff's disciplinary hearing a mistake had been made in finding Plaintiff

guilty. Plaintiff will seek to have Mr. Holevinski clarify this statement and implicate the defendants or persons unknown that have conspired to violate Plaintiff's civil rights.

14. All rebuttal, defense, and defense rebuttal witnesses.

RESPECTFULLY SUBMITTED this 17th day of April, 1994.

/s/ Jerry B. Balisok
JERRY B. BALISOK
PLAINTIFF PRO SE

15. Sgt. Hartford
PO Box 520
Walla Walla, Wa 99362

Sgt. Hartford will testify that Intelligence and Investigation had uncovered evidence that John Adams falsely implicated Plaintiff for the sole purpose of being transferred to McNeil Island Correction Center.

16. C/O Scott Skramstead; PO Box 520, Walla Walla, WA 99362

Mr. Skramstead will testify the same as Sgt. Hartford

17. Stephen Sinclair
PO Box 520
Walla Walla, Wa 99362

Mr. Sinclair will testify the same as Sgt. Hartford.

[FILED]
[November 22, 1995]

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 95-35307
95-35310

D.C. No. CV-93-00416-JLQ

MEMORANDUM*

JERRY B. BALISOK,
Plaintiff-Appellant,
Cross-Appellee,

v.

GARY P. EDWARDS; TANA WOOD,
Defendants-Appellees-
Cross-Appellants,

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Submitted November 20, 1995**

Filed November 22, 1995

Before: PREGERSON, NORRIS and REINHARDT, Circuit Judges.

Washington state prisoner Jerry B. Balisok appeals and Washington state prison officials Gary Edwards and Tana Wood cross-appeal the district court's order staying Balisok's 42 U.S.C. § 1983 action. We reverse and remand.

These appeals are governed by our recent decision in Gotcher v. Wood, No. 94-35484, slip op. 12881 (9th Cir. Oct. 4, 1995), in which we held that an inmate's challenge to the procedure by which he was denied good-time credits did not call into question the lawfulness of his continuing confinement and was not barred by Heck v. Humphrey, 114 S. Ct. 2364 (1994). Because Balisok's due process challenges to prison disciplinary procedures were not barred by Heck, see Gotcher, slip op. at 12885-86, we reverse the district court's order staying Balisok's section 1983 action and remand for further proceedings.

REVERSED AND REMANDED.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.2

(5)

NO. 95-1352

Supreme Court, U.S.
FILED
JUN 28 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

vs.

JERRY B. BALISOK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

KATHLEEN D. MIX*
TALIS MERLE ABOLINS
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
DANIEL J. JUDGE
Assistant Attorneys General
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445
*Counsel of Record
Counsel for Petitioner

PETITION FOR CERTIORARI FILED FEB. 20, 1996
CERTIORARI GRANTED APRIL 29, 1996

40 pp

QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. __, 114 S.Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time?

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 1

III. STATUTORY PROVISIONS 1

IV. STATEMENT OF THE CASE 2

A. Balisok's State Prison Disciplinary Proceeding . 3

B. Proceedings Below 4

V. SUMMARY OF ARGUMENT 6

VI. ARGUMENT 9

A. Attacks On The Legality Or Duration of Confinement Must Be Resolved Through Habeas Corpus, Not § 1983. 9

B. Balisok Must Exhaust His Habeas Corpus Remedies Under The Bright-Line Rule. 12

1. Requiring Balisok To Exhaust Is Necessary To Preserve The Fundamental Purposes of Comity That Underlie The Exhaustion Requirement. 13

2. The Purpose Of Due Process At A Prison Disciplinary Hearing Is To Prevent The Arbitrary Or Unjustified Denial Of Good-Time Credits. 17

3. The Bright-Line Rule Is Necessary To Prevent Prisoners From Intentionally Or Unwittingly Evading Habeas Exhaustion. . 19

4. The Bright Line Rule Will Be Sensibly And Easily Applied By District Courts. 24

C. Under Tort Law Principles, Balisok's § 1983 Claim Will Not Accrue Unless He First Prevails In A Habeas Corpus Action. 27

D. Requiring Balisok's § 1983 Claim To Be Dismissed Is Not Inconsistent With *Wolff v. McDonnell*. 32

VII. CONCLUSION 35

TABLE OF AUTHORITIES

Cases — Page

Alexander v. Ware,
714 F.2d 416 (5th Cir. 1983) 33

Bell v. Hood,
327 U.S. 678 (1946) 20

Bell v. Wolfish,
441 U.S. 520 (1979) 14

Carey v. Piphus,
435 U.S. 247 (1978) 17, 18, 25, 27

Casey v. Lewis,
___ U.S. ___, 1996 WL 340797 (1996) 14

Colorado River Water Conser. Dist. v. U.S.,
424 U.S. 800 (1976) 15

Conley v. Gibson,
355 U.S. 41 (1957) 24

Daniels v. Williams,
474 U.S. 327 (1986) 16

Del Raine v. Carlson,
826 F.2d 698 (7th Cir. 1987) 20

Dumas v. State,
654 So.2d 48 (Ala. 1994) 32

Elkin v. Fauver,
969 F.2d 48 (3rd Cir. 1992) 31

Ex parte Royall,
117 U.S. 241 (1886) 13

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S 100 (1981) 13

Gerstein v. Pugh,
420 U.S. 103 (1975) 33

Gotcher v. Wood,
66 F.3d 1097 (9th Cir. 1995) 6, 19, 22, 23

Greene v. Meese,
875 F.2d 639 (7th Cir. 1989) 20

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,
442 U.S. 1 (1979) 33

Hayes v. Thompson,
637 F.2d 483 (7th Cir. 1980) 19, 31

Heck v. Humphrey,
512 U.S. ___, 114 S. Ct. 2364 (1994) . . . . . 5, 6, *passim*

Hrbek v. State,
478 N.W.2d 617 (Iowa 1991) 19

In re Burton,
80 Wn. App. 573, 910 P.2d ___,
review denied, ___ Wn.2d ___ (1996) 31

In re Hunter,
43 Wn. App. 174, 715 P.2d 1146 (1986) 31

In re Reismiller,
101 Wn.2d 291, 678 P.2d 323 (1984) 31

Kingsley v. Bureau of Prisons,
937 F.2d 26 (2nd Cir. 1991) 19, 30

Los Angeles v. Lyons,
461 U.S. 95 (1983) 34

Meachum v. Fano,
427 U.S. 215 (1976) 14

Memphis Community School Dist. v. Stachura,
477 U.S. 299 (1986) 27

Miller v. Indiana Dept. of Corrections,
75 F.3d 330 (7th Cir. 1996) 29

Monroe v. Pape,
365 U.S. 167 (1961) 27

Morrissey v. Brewer,
408 U.S. 471 (1972) 16

Mt. Healthy City School Dist. v. Doyle,
429 U.S. 274 (1977) 20

Nelson v. Murphy,
44 F.3d 497 (7th Cir. 1995) 16

O'Shea v. Littleton,
414 U.S. 488 (1974) 34

Offet v. Solem,
823 F.2d 1256 (8th Cir. 1984) 16, 33

Parratt v. Taylor,
541 U.S. 527 (1981) 16

Patsy v. Board of Regents,
457 U.S. 496 (1982) 10

Paul v. Davis,
424 U.S. 693 (1976) 27

People v. Superior Court,
230 Cal. App. 3d 1592, 281 Cal. Rptr.
900 (1991) 32

Ponte v. Real,
471 U.S. 491 (1985) 14

Preiser v. Rodriguez,
411 U.S. 475 (1973) . . . . . 6, 7, *passim*

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 15

Rodriguez v. McGinnis,
451 F.2d 730 (2d Cir. 1971) 20

Rodriguez v. McGinnis,
456 F.2d 79 (2d Cir. 1972) 20

Rose v. Lundy,
455 U.S. 509 (1982) 13

Sandin v. Conner,
115 S. Ct. 2293 (1995) 14, 16, 19

Serio v. Members of Louisiana State
Board of Pardons,
821 F.2d 1112, (5th Cir. 1987) 33

Sheldon v. Hundley,
83 F.3d 231 (8th Cir. 1996) 29

State v. Balisok,
123 Wn.2d 114, 866 P.2d 631 (1994) 2, 5

Superintendent, Mass. Corr. Institution v. Hill,
472 U.S. 445 (1985) 14

Turner v. Safley,
482 U.S. 78 (1987) 14

United States Parole Com'n v. Geraghty,
445 U.S. 388 (1980) 34

Wolff v. McDonnell,
418 U.S. 539 (1974) 9, 14, 30, 32-34

Wood v. Gotcher,
Supreme Court No. 95-1385 . . . . . 5, 23

Younger v. Harris,
401 U.S. 37 (1971) 14

Statutes & Regulations

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1651 26

28 U.S.C. § 2254 . . . . . 9, 13, 26

28 U.S.C. § 2254(b) 1, 13

42 U.S.C. § 1983 . . . . . 2, 4, *passim*

42 U.S.C. § 1988 . . . . . 13, 22, 24, 25

Anti-Terrorism and Effective Death Penalty Act
of 1996, Pub. L. No. 104-132, Ch. 153, § 104
(to be codified at 28 U.S.C. § 2254(b)) 2, 21

WAC 137-28 3

Other Authorities

8 S. Speiser, C. Krause, & A. Gans, American
Law of Torts § 28:5 (1991) 28

*Doumar, Prisoner Cases: Feeding the Monster
in the Judicial Closet*, 14 St. Louis U. Pub.
L. Rev. 21 (1994) 10, 22

Fed. R. Civ. P. 12(b)(6) 8, 24

Fed. R. Civ. P. 54(d) 24

Prosser and Keeton on Law of Torts,
§ 120 (5th Ed. 1984) 29

Schwartz, *The Preiser Puzzle: Continued
Frustrating Conflict Between the Civil Rights
and Habeas Corpus Remedies for State Prisoners*,
37 DePaul L. Rev. 87 (1988) 10, 22

Tribe, American Constitutional Law
§ 10-7 (2d Ed. 1988) 18

I. OPINIONS BELOW

The United States District Court for the Eastern District of Washington entered its Order Denying Defendants' Motion To Dismiss and Staying Action, and certified the case for immediate appeal. App. F. Following timely appeals by all parties, the United States Court of Appeals for the Ninth Circuit reversed and remanded. App. A. Both decisions are unreported.

II. JURISDICTION

The court of appeals entered its judgment on November 22, 1995. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS

28 U.S.C. § 2254(b)[1] provides: "An application

---

[1]This statute was in effect until April 26, 1996 when it was amended as follows:

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> > "(A) the applicant has exhausted the remedies available in the courts of the State; of
> > "(B)(I) there is an absence of available State corrective process; or
> > "(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> "(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in

for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV. STATEMENT OF THE CASE

Respondent Jerry Balisok is an inmate in the custody of the Washington State Department of Corrections (DOC) pursuant to a 240 month sentence for attempted murder in the first degree. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Shortly after his conviction, Balisok transferred to the Washington State

---

the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Ch. 153, § 104 (to be codified at 28 U.S.C. § 2254(b)).

Penitentiary (WSP), in Walla Walla, Washington. During his stay at WSP, Balisok became known by the United States District Court for the Eastern District as "an inmate who has filed numerous lawsuits . . . [and who] assists other inmates with their legal actions." App. F-3.

A. Balisok's State Prison Disciplinary Proceeding

Like all prisons within the DOC, officials at WSP enforce a prison disciplinary code, which sets forth a broad range of prison misconduct. Chapter 137-28 Washington Administrative Code (WAC). Violations of this code can result in a number of sanctions, including a loss of good-time credits.

In August 1993, prison officials notified Balisok that he had been charged with violations of the prison's disciplinary code. According to the infraction report, Balisok attempted to blackmail inmate Adams into lying about an innocent person. Balisok threatened to label Adams as an informant if he did not comply with Balisok's demand. App. K-1 to K-3.

On August 20, 1993, Balisok appeared at a prison disciplinary proceeding before Lt. Gary Edwards. Balisok denied that he was guilty of the rule violations, and claimed that Adams had set him up in order to avoid his own responsibility for stealing test answers. App. K-1 to K-3, L-1 to L-4. Balisok also complained that he was unable to present exculpatory evidence. App. K-2.

Edwards found Balisok guilty based upon documentation from an investigation, including a written report by a Custody Unit Supervisor. Edwards recommended that Balisok receive a sanction which included a loss of 30 days good-time credits. App. K-2 to K-3.

Balisok appealed the finding and sanction to WSP Superintendent Tana Wood. She rejected the appeal because it exceeded the 2-page limit, and imposed sanctions. Balisok then asked that his appeal be reconsidered. Wood responded by affirming the disciplinary finding and sanctions. App. H-5, F-3. Balisok did not challenge the disciplinary procedures or sanctions in state court.

B. Proceedings Below

On December 10, 1993, Balisok filed a civil rights complaint under 42 U.S.C. § 1983 alleging that Petitioners Edwards and Wood violated his due process rights at a prison disciplinary hearing which resulted in the loss of 30 days good-time credits. App. H. In his original complaint, Balisok alleged that Edwards failed to admit and consider exculpatory witness statements, and failed to provide a written report specifying the documents and testimony on which the disciplinary sanction was based. Balisok alleged that Wood violated his rights when she refused to reverse the disciplinary finding, remove the infractions from his record, and restore his good-time credits. App. H-4, H-7 to H-24, JA 3-8.

For relief, Balisok requested: (1) a declaratory judgment that the sanction of the loss of 30 days good-time credits deprived him of liberty without due process; (2) a declaratory judgment that Wood's refusal to reverse the disciplinary decision and remove the infractions violated his right to due process; (3) an injunction mandating removal of the infractions from his record and all residual effects stemming therefrom; and (4) compensatory and punitive damages in the amount of $80,000. App. H-24 to H-34.

On March 23, 1994, the prison officials moved to

stay the litigation pending Balisok's exhaustion of his habeas corpus remedies. The District Court stayed the motion to stay, anticipating this Court's decision in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). App. E. On June 24, 1994, this Court decided *Heck* and ruled habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring a § 1983 action for damages, if judgment for the prisoner would necessarily imply the invalidity of his conviction or sentence.

Following the *Heck* decision, the prison officials filed a motion to dismiss Balisok's complaint.[2] With his response to the motion, Balisok filed an amended complaint in which he dropped his claim for restoration of good-time credits. He refashioned his claim as one seeking relief from procedures, rather than relief from the result of the disciplinary proceeding. App. I.

Balisok alleged that the prison officials denied his presentation of witness statements in retaliation for being a jailhouse lawyer. App. I-6, I-7. His allegations expressly reserved the right to challenge the loss of good-time credits at a later date. App. F-4.

On February 6, 1995, the district court resolved the Defendants' motion to dismiss by entering a stay of proceedings and certifying the *Balisok* case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. App. F-15. Even though Balisok dropped his claim for good-time credits, the district court concluded that his "due process claim is a challenge to his conviction

---

[2]For the purpose of this motion Petitioners assumed that Balisok had a liberty interest in the good-time credits. That question is not raised in this case. It is raised in a companion petition for a writ of certiorari in *Wood v. Gotcher*, Supreme Court No. 95-1385, which is currently pending.

of an offense at the disciplinary proceeding, which would affect the length of his sentence." App. F-12. The district court reasoned that if "the disciplinary hearing at issue did violate [Balisok's] due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credits, were also unconstitutional and invalid." App. F-11.

The Ninth Circuit granted both parties' requests to appeal. On November 22, 1995, the Ninth Circuit summarily reversed and remanded, citing *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).[3] JA 9-10. The Ninth Circuit focused exclusively on the relief sought in Balisok's amended complaint. It did not analyze Balisok's claims to determine if they would call into question his loss of good-time credits.

Defendants filed a timely petition for writ of certiorari, which this Court granted on April 29, 1996.

V. SUMMARY OF ARGUMENT

In *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973), prisoners brought a § 1983 action that challenged the constitutionality of prison disciplinary proceedings, and specifically sought restoration of good-time credits. Applying principles of federal-state comity, this Court categorized the prisoner's claims as attacks on duration of confinement and required the prisoners to exhaust their habeas corpus remedies. In *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994), a prisoner brought a § 1983 action that challenged the prosecution of his criminal case, and specifically sought damages for the confinement that

---

[3]The Ninth Circuit's opinion in *Gotcher* is included as Appendix M. The state defendants in *Gotcher v. Wood* seek review of this decision. *See* n.2, *supra* p. 5.

resulted from his conviction. Applying principles of tort law, this Court held that the § 1983 claim had not accrued because a judgment in favor of the prisoner would necessarily conflict with the valid conviction. In this case, Balisok brought a § 1983 action that challenged the constitutionality of a prison disciplinary hearing, and specifically sought restoration of lost good-time credits. Balisok later amended his complaint to delete the request for restoration of good-time credits. Balisok may not proceed under § 1983 for two independent reasons: (1) Balisok must first exhaust his habeas corpus remedies because the essence of his complaint is an attack on the duration of his confinement, and (2) Balisok's § 1983 action has not accrued because, if successful, it would necessarily conflict with his underlying sentence.

Under the principles of *Preiser*, Balisok's § 1983 action should be subject to the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a prison disciplinary hearing. Under this bright-line rule, Balisok cannot proceed with his § 1983 action because his claim could also support a claim for restoration of lost good-time credits. This bright-line rule must be applied for four reasons.

First, in deciding when to require exhaustion, this Court looks to the fundamental purposes from which the requirement is derived: federal-state comity. This Court has recognized the State's strong interest in the administration of its prisons and that federal courts should not be involved in the day to day management of state prisons. When a prisoner alleges that his good-time credits were taken without due process, the State must be given the first opportunity to pass upon the alleged violations and, if possible, correct the error.

Second, the purpose of due process at a prison disciplinary hearing is to prevent the arbitrary or unjustified denial of good-time credits. The need for exhaustion results from the nature of the particular substantive interests which Balisok claims were unlawfully taken -- his fundamental interests in liberty and freedom from unlawful custody. His procedural claims are inseparable from the liberty interest because, without a deprivation of liberty, he would have no procedural rights to enforce.

Third, the bright-line rule is necessary to prevent prisoners from intentionally or unwittingly evading the habeas corpus requirement. The Ninth Circuit's holding in this case, which looks only to the relief requested in a prisoner's pleading, either (1) rewards manipulative jailhouse lawyers, like Balisok, by allowing them to bypass exhaustion and attack their disciplinary hearing for the first time in a § 1983 action in federal court, or (2) punishes unsophisticated inmate plaintiffs whose inartful complaints ask for § 1983 relief, when habeas relief is the desired remedy.

Fourth, the bright-line rule provides a workable standard which district courts will be able to apply easily at the pleading stage. Fed. R. Civ. P. 12(b)(6) provides the district courts with a standard for determining whether a prisoner's complaint could state a claim for restoration of good-time credits.

Balisok's § 1983 challenge is also barred under the principles of tort law applied in *Heck*. When success in a § 1983 action would necessarily conflict with the plaintiff's underlying basis for confinement, the § 1983 claim will not accrue until the plaintiff eliminates the conflict by successfully exhausting habeas corpus remedies. Balisok's § 1983 claim has not accrued because his due process allegations, if proven, would necessarily require restoration of his good-time credits.

Whether Balisok's § 1983 claim is barred under the principles of habeas corpus or tort law, the result is consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Application of the bright-line rule in this case does not conflict with *Wolff* because *Wolff* involved a broad-based class action challenge to established and undisputed prison disciplinary procedures, as opposed to the isolated claim of an inmate attacking the constitutionality of a specific disciplinary hearing. The process of class certification allows the federal court to ensure that prisoners seeking prospective relief from unconstitutional disciplinary procedures are not merely attempting to evade the exhaustion requirement by labeling their pleadings in a certain way. Applying the tort principles of *Heck* to Balisok's case does not conflict with *Wolff* because, unlike the claims brought by Heck and Balisok, there was no reason to believe that the claims brought in *Wolff* would necessarily have invalidated a loss of good-time credits.

The Ninth Circuit should be reversed, and Balisok should be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

VI. ARGUMENT

A. Attacks On The Legality Or Duration of Confinement Must Be Resolved Through Habeas Corpus, Not § 1983.

This case involves "the interrelationship of two important federal laws": the federal habeas corpus statute, 28 U.S.C. § 2254, and the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973). These statutes provide a federal forum for claims of unconstitutional

treatment at the hands of the state, and are "the two most fertile sources of federal-court prisoner litigation". *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364, 2369 (1994). Under the principles of habeas corpus codified in § 2254, a prisoner must first exhaust state remedies before pursuing relief in the federal forum. The general rule for claims brought under § 1983 is that the prisoner need not exhaust state remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982).

In the area of prisoner litigation, these two statutes frequently overlap. As a result, federal courts are often faced with claims like those of Balisok which, although falling within the literal terms of § 1983, directly implicate the fact or duration of the plaintiff's confinement in a state prison.[4] The federal court must determine if such a claim is in "essence" a habeas corpus claim, which is defined as "an attack by a person in custody upon the legality of that custody". *Preiser*, 411 U.S. at 484. If the claim is categorized as an attack on the legality of custody, it is subject to the rule of exhaustion:

> "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." *Preiser*, 411 U.S. at 490.

Until the prisoner has exhausted his habeas corpus

---

[4]Such claims have been referred to as "Preiser puzzles". Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 87, 88 (1988).

remedies, his or her claim will not be cognizable under § 1983. *Preiser*, 411 U.S at 488-490; *Heck*, 114 S. Ct. at 2369.

In *Preiser*, the prisoners specifically sought an injunction to restore good-time credits lost as a result of their hearing. This Court held that these claims were not cognizable under § 1983 until the prisoners exhausted their habeas corpus remedies. *Preiser*, 411 U.S. at 488-90. This Court based its decision on important principles of federal-state comity.

In *Heck*, this Court articulated a second basis for the conclusion that a prisoner cannot use § 1983 to attack the legality or duration of confinement. The prisoner in *Heck* sought damages based on the claim that his conviction was illegal. 114 S. Ct. at 2368 n.2. Applying principles of tort law, this Court held that such a claim for damages does not accrue unless the conviction has been invalidated and a conviction can only be attacked on direct appeal or through a habeas corpus action. *Heck*, 114 S. Ct. at 2372-73.

In *Preiser* the prisoners attacked the constitutionality of prison disciplinary proceedings and specifically sought restoration of good-time credits. In *Heck* the prisoner specifically sought damages for unlawful confinement resulting from his conviction. In this case, Balisok attacks the constitutionality of a prison disciplinary proceeding in which he lost good-time credits. Although he originally sought restoration of his good-time credits and other relief, Balisok amended his complaint to delete the request for the restoration of good-time credits. The question is whether Balisok can bring such a § 1983 claim.

The answer is no for two reasons. First, Balisok's claim is properly categorized as an attack on the length of his confinement. His claims by their very nature call into question the loss of good-time credits resulting from his

disciplinary hearing and, consequently, the length of his sentence. The principles of comity recognized by this court in *Preiser* call for application of the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a disciplinary hearing.

Second, the principles of tort law applied in *Heck* also apply here. As a result, Balisok's claim, if successful, will necessarily call into question his loss of good-time credits. Balisok's § 1983 claim will not accrue unless he successfully challenges his loss of good-time credits and this can only be done in a habeas corpus action.

These are independent grounds for requiring that Balisok's § 1983 claim be dismissed.

B. Balisok Must Exhaust His Habeas Corpus Remedies Under The Bright-Line Rule.

Based on the principles of *Preiser*, this Court should apply the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a prison disciplinary hearing. This bright-line rule is appropriate because it: (1) preserves the fundamental principles of federal-state comity which underlie exhaustion; (2) recognizes the primacy of the liberty interest which lies at the heart of a due process challenge; (3) allows a federal court, and not the unreliable pleadings of pro se inmates, to determine where jurisdiction over the claim lies; and (4) provides an easily applied solution to a jurisdictional problem that has puzzled district courts and litigants for years.

This case illustrates the propriety of the bright-line

rule. Balisok is attempting to bypass exhaustion by strategically amending the relief section of a complaint that attacks the prison disciplinary hearing where the duration of his confinement was extended. Although Balisok has temporarily dropped his claim for good-time credits, he has not altered the essence of his claim that state officials have unlawfully deprived him of good-time credits without due process of law. The bright-line rule properly categorizes Balisok's claim for what it is -- an attack on his duration of confinement. As such, his claim is not cognizable under § 1983.

1. Requiring Balisok To Exhaust Is Necessary To Preserve The Fundamental Purposes of Comity That Underlie The Exhaustion Requirement.

In deciding whether to require exhaustion, this Court looks to the fundamental purposes from which the requirement is derived. *Rose v. Lundy*, 455 U.S. 509, 517-519 (1982) (citations omitted); *Preiser*, 411 U.S. at 490-492. The exhaustion requirement is rooted in important considerations of federal-state comity that were found to be fundamental by this Court long before Congress codified it in 1948.[5] *Preiser*, 411 U.S. at 490-491; *Ex parte Royall*, 117 U.S. 241, 251 (1886); *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S 100 (1981), *quoting*

---

[5]The enactment of § 2254(b) was simply designed to declare the common law rule of exhaustion which predated the original enactments of both § 1983 and § 2254. *Preiser*, 411 U.S. at 490-491; *Rose v. Lundy*, 455 U.S. 509, 515, n.8 (1982) (citations omitted). This Court should look to the policies of comity in order to define the proper scope and application of the exhaustion rule for § 1983 claims which relate to confinement. *Rose*, 455 U.S. at 517-519; *Preiser*, 411 U.S. at 490-492. *See also*, 42 U.S.C. § 1988, discussed *infra* p. 25.

Younger v. Harris, 401 U.S. 37, 44 (1971). Exhaustion avoids an unnecessary friction between state and federal courts over issues relating to a state prisoner's confinement by giving state courts the first opportunity to address any claims of unconstitutional confinement. *Preiser*, 411 U.S. at 490-492.

This Court has repeatedly reaffirmed in both habeas corpus and § 1983 cases a fundamental principle of comity: the day-to-day management of a state prison is best left to the state courts and state officials, and should only be subject to scrutiny by the federal judiciary in exceptional cases.[6] The exhaustion requirement should be applied in this case in order to preserve this fundamental principle.

In *Preiser*, this Court held that habeas corpus is the exclusive remedy for a state prisoner attacking the fact or duration of his confinement. *Preiser*, 411 U.S. at 490, 500. Like Balisok, the prisoners in *Preiser* brought a § 1983 challenge to the constitutionality of their prison disciplinary hearing. The prisoners tried to avoid the exhaustion requirement, arguing that the interests of comity that exist when a criminal conviction is challenged are not as weighty when the challenge is to a prison disciplinary hearing.

The Court rejected this argument, noting that the prisoners viewed the reasons for exhaustion "far too narrowly." *Preiser*, 411 U.S. at 491. This Court found the exhaustion requirement to be particularly important in cases where a prisoner challenges a prison disciplinary

---

[6] *Preiser*, 411 U.S. at 491-492; See also *Casey v. Lewis*, ___ U.S. ___, 1996 WL 340797 (1996); *Sandin v. Conner*, 115 S. Ct. 2293, 2299 (1995); *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 456 (1985); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985); *Bell v. Wolfish*, 441 U.S. 520, 545-547 (1979); *Meachum v. Fano*, 427 U.S. 215, 228-229 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 562-563 (1974).

proceeding:

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser*, 411 U.S. at 491-492.

States have a fundamental interest in the administration of their prisons, and the internal problems of state prisons are peculiarly within state authority and expertise. *Preiser*, 411 U.S. at 492. State courts are more familiar with, and in a better physical and practical position to efficiently deal with, the day-to-day grievances of state prisoners. *Preiser*, 411 U.S. at 492.

For these reasons, *Preiser* held that states should be given the "first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492. When the state is given the first opportunity to correct such errors through its expedited habeas proceedings, it is in a better position to avoid both the injustice of an unlawful deprivation of good-time credits, as well as the resulting potential for civil rights liability.[7]

---

[7] Doctrines of abstention provide additional support for the importance of exhaustion in this case. *See Colorado River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 812-814 (1976) (*citations omitted*); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Under *Pullman*, abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 812 (1976) (*citations omitted*). If given the opportunity, a Washington Court could provide a state post-deprivation remedy to Balisok that would make any federal ruling on the constitutional issues unnecessary. The fact that

The State of Washington "has no interest" in subjecting an individual to confinement without affording minimal procedural guarantees. *Morrissey v. Brewer*, 408 U.S. 471, 495 (1972). If a prisoner alleges that these guarantees were not met, the State has a fundamental interest to ensure that the prisoner is not subject to confinement without reason. The mere fact that the prisoner currently seeks truncated relief from procedures under § 1983 does not eliminate the State's interest in ensuring that those within its custody are not there for an unlawful length of time.[8] The decision to confine a prisoner is a matter of state law, and not a matter of the prisoner's own volition.

This first opportunity to correct alleged due process errors is especially important when the ultimate question of due process turns on whether the state has "created" a liberty interest in good-time credits. Determining the existence of a state created liberty interest requires a review not just of a specific prison hearing, but the entire state disciplinary system itself. *Sandin v. Conner*, 115 S.

Balisok cannot immediately seek relief under § 1983, "does not mean that the state [post-deprivation] remedies are not adequate to satisfy the requirements of due process." *Parratt v. Taylor*, 541 U.S. 527, 544 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *see also Nelson v. Murphy*, 44 F.3d 497, 502-503 (7th Cir. 1995); *Offet v. Solem*, 823 F.2d 1256, 1262-63 (8th Cir. 1984)(Arnold, J., dissenting) (discussing the appropriateness of abstention in prisoner cases).

[8]Requiring exhaustion will not unduly delay the prisoner's ability to seek additional relief under § 1983. This Court has recognized that state courts act expeditiously to resolve such challenges, whereas civil rights actions can take "a significant amount of time". *Preiser*, 411 U.S. at 494-496.

Ct. 2293, 2301-02 (1995). It is difficult to imagine any question where the State's interest and expertise in an initial review would be stronger.[9]

The bright-line rule -- that exhaustion is required if the allegations "would state a claim" for restoration of good-time credits -- is necessary to preserve the principles of federal-state comity that are important in the area of prisoner discipline.

2. The Purpose Of Due Process At A Prison Disciplinary Hearing Is To Prevent The Arbitrary Or Unjustified Denial Of Good-Time Credits.

The bright-line rule also recognizes that the primary interest that due process serves to protect is the freedom from unlawful state confinement. Balisok's claim must be exhausted because, despite the relief currently sought, the essence of the claim is an attack on the accuracy of a disciplinary sanction imposed by state prison officials.

The fact that Balisok seeks relief from procedures rather than the resulting loss of good-time credits does not alter the essence of his due process claim. By their very nature, procedural due process claims are attacks on the result of a proceeding which has adversely affected a substantive constitutional interest of the plaintiff. Although a plaintiff may, in an exceptional case, be able to demonstrate compensable injury from a procedure, the right to the procedure should not be elevated to a level above the substantive constitutional interest that it protects.

Rules governing relief for constitutional deprivations are tailored to the interest protected by the particular right in question. *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

---

[9]*See* n.2, *supra*, p. 5.

> "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254.

Due process exists to protect the individual's interest in avoiding "the mistaken unjustified deprivation of life, liberty, or property". *Carey*, 435 U.S. at 259. See Tribe, American Constitutional Law § 10-7, pp. 666-677 (2d Ed. 1988). Rather than an end in itself, due process is an instrument to ensure that the state does not mistakenly or unjustifiably deprive a person of a substantive interest. This "instrumental" purpose of procedural due process is not designed to secure the individual's participation in a "process" for the sake of process. The purpose of due process "is less to assure **participation** than to use participation to assure **accuracy**" in the outcome of the process. Tribe, at 666-667 and 671 (emphasis in original).

The need for exhaustion results from the nature of the particular interests which Balisok claims were unlawfully taken -- his fundamental interests in liberty and freedom from unlawful state custody. The essence of Balisok's claim is that prison officials have unconstitutionally deprived him of a liberty interest in good-time credits without procedural due process. Balisok's claim is inextricable from the substantive interest in liberty that lies at the heart of a due process claim.

The essence of Balisok's claims are underscored by the remedy afforded when challenges to prison disciplinary hearings are successful. Both federal courts and state courts will reverse the decisions and sanctions of prison disciplinary officers where the prisoner is denied an opportunity to prevent exculpatory evidence. *See, e.g.*,

Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2nd Cir. 1991) (sanction could not stand due to arbitrary denial of witnesses); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980) (expungement required where "defects in the procedures . . . significantly affected Hayes ability to demonstrate his innocence"); *Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991) ("An unjustified refusal to permit live testimony of a defense witness . . . will warrant reversal"). In contrast, courts have rarely, if ever, provided a prisoner with nominal, let alone compensatory, damages resulting from a prison procedure itself.

It is ironic, in light of *Sandin*, that in order to proceed in federal court, Balisok attempts to disclaim his interest in the "atypical and significant deprivation" that is necessary to enable him to raise the claim in the first place. If Balisok had not lost good-time credits at his hearing, he would be unable to bring any due process claim, no matter how outrageous or harmful the procedural violation for without deprivation of a liberty interest, he would have no due process rights.

3. The Bright-Line Rule Is Necessary To Prevent Prisoners From Intentionally Or Unwittingly Evading Habeas Exhaustion.

The Ninth Circuit's holding in *Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995); App. A-7, gives prisoners, rather than courts, the power to decide questions of federal court jurisdiction. Under this holding, prisoners need not exhaust state habeas remedies as long as they can craft a § 1983 complaint containing a "claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits)." *Id. quoting Heck*, 114 S.Ct. at 2370. This holding leads to results that are at odds with the exhaustion requirement and the principle of

Preiser that prisoners not be allowed to mislabel their pleadings in order to circumvent exhaustion. *Preiser*, 411 U.S. at 489-490.

As a corollary to the exhaustion requirement, *Preiser* established the principle that prisoners must not be allowed to manipulate their pleadings in an effort to deprive the states of their "first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492. In *Heck*, the Court similarly directed district courts to consider the potential substantive outcome of a favorable judgment for the prisoner, not the label on the pleadings.[10] *Heck*, 114 S. Ct. at 2372. Mindful of the incentive for prisoners to attempt to circumvent the exhaustion requirement, *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleadings." *Preiser*, 411 U.S. at 489-90.[11] The incentive for circumvention is even greater today, in light of the new stringent standards for review of habeas

---

[10]This Court emphasized that the district court bears the responsibility to analyze the implications of a § 1983 suit in relation to the fact or duration of the prisoner's confinement. *Heck*, 114 S. Ct. at 2372. That federal jurisdiction cannot be established by an allegation that is "made solely for the purpose of obtaining jurisdiction". *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 279 (1977), *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946).

[11]The Second Circuit, in its decision in *Preiser* before review was granted by this Court, recognized that "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of the [habeas corpus statute]." *Rodriguez v. McGinnis*, 451 F.2d 730, 731 (2d Cir. 1971). *See also Rodriguez v. McGinnis*, 456 F.2d 79, 84 (2d Cir. 1972) (en banc) (Mansfield, J., concurring) ("state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes".). *See e.g., Greene v. Meese*, 875 F.2d 639, 641-42 (7th Cir. 1989); *Del Raine v. Carlson*, 826 F.2d 698, 703 (7th Cir. 1987).

claims in federal court.[12]

Dismissal is appropriate for Balisok's § 1983 complaint because Balisok's manipulation of the pleadings is apparent and his claim is not cognizable. Before strategically amending the complaint, Balisok explicitly sought restoration of good-time credits. App. H-32. The fact that Balisok altered the relief section of his pleading does not alter the essence of his claim. This abuse of § 1983 jurisdiction is stopped by the bright-line rule requiring exhaustion of all challenges to prison disciplinary proceedings where the complaint would also state a claim for restoration of the lost good-time credits. Without this bright-line rule, it will be easy for prisoners to defeat the

---

[12]The new standard of review for federal habeas corpus is:

> "(d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Ch. 153, § 104 (to be codified at 28 U.S.C. § 2254(d))

fundamental purposes of exhaustion.[13] *See* Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21, 36 (1994).

In contrast to the reward given to manipulative *pro se* inmates, the Ninth Circuit's holding in *Gotcher* causes an injustice for prisoners who do not intend to circumvent exhaustion. Under this holding, unsophisticated pro se litigants who may logically seek an earlier release from confinement, will instead languish in civil rights actions merely because they failed to clearly specify their claim for freedom from an unlawful confinement. *See* Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 125-26 (1988).

The Ninth Circuit's focus on the relief sought in the pleading can sidetrack *pro se* prisoners along the lengthy path of discovery and pre-trial proceedings of a § 1983 action, and does not accommodate the prisoner's interest in speedy relief from unlawful confinement. Rather than obtaining the relief prisoners logically seek (release from confinement), prisoners run the significant risk of serving lengthened sentences before their civil action can be resolved, thereby forever losing their right to early release from unlawful confinement.[14]

---

[13]The threat of circumvention is not unique to jailhouse lawyers. A real potential exists that attorneys will also seek to circumvent habeas corpus remedies because attorney's fees under § 1988 are available for § 1983 claims, and are not available for habeas corpus claims.

[14]For example in *Gotcher*, the inmate filed a civil rights action in which he claimed that "his loss of good conduct time credits and placement in disciplinary segregation constituted compensable violations of his due process rights", and sought unspecified injunctive relief. *See* App. M-5 (emphasis supplied). Despite his claim that the loss of good-time credits resulted in compensable injury, the Ninth Circuit focused on the label of Gotcher's pleading and failed to direct

Unlike the Ninth Circuit's *Gotcher* holding, the bright-line rule gives appropriate treatment to both sophisticated and unsophisticated *pro se* prison litigators. The requirement that prisoners first exhaust challenges that would state a claim for restoration of good-time credits provides a standard that will eliminate the troubling grey area between habeas corpus and civil rights proceedings, and prevent inmates from intentionally or unwittingly circumventing the exhaustion requirement.

The bright-line rule will ensure that either a state or federal court will be in a position to restore good-time credits pursuant to the expedited procedures of habeas corpus. Like other states, Washington provides its prisoners with a clear expedited remedy for challenges to prison disciplinary proceedings resulting in a loss of good-time credits. Washington Rules of Appellate Procedure 16.9 and 16.11. The expedited nature of state and federal habeas relief diminishes any argument by Balisok that he will be prejudiced by the delay of first pursuing habeas relief.

---

exhaustion of habeas remedies. By pursuing his claims under § 1983, Gotcher experienced substantial delay in his efforts to resolve his claim. After filing his complaint, Gotcher was forced to wait two years before the Ninth Circuit issued the decision remanding the case for a review on the merits. By that time, Gotcher had already been released from prison. *See* Respondent's Brief in Opposition, at p. 4, *Wood v. Gotcher*, Supreme Court No. 95-1385. Having served his extended sentence, Gotcher forever lost his ability to seek restoration of the good-time credits, and the State is exposed to greater liability because its courts were not given any opportunity to expedite his release based upon the errors alleged in his "civil rights" lawsuit.

4. The Bright Line Rule Will Be Sensibly And Easily Applied By District Courts.

The bright-line rule requiring exhaustion of complaints that would state a claim for restoration of good-time credits provides an easy, workable standard for district courts to apply at the pleading stage, without resort to fact-bound inquiries. The bright-line rule is consistent with the principles that have guided the federal courts in review of pleadings under Fed. R. Civ. P. 12(b)(6) and 42 U.S.C. § 1988.

Federal courts are well versed in reviewing prisoner complaints under Fed. R. Civ. P. 12(b)(6) to determine whether the allegations support a claim for constitutional relief. A claim should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Federal courts are not limited by the relief expressly sought in the complaint. Federal rules provide that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in the party's pleadings**." Fed. R. Civ. P. 54(d) (emphasis supplied).

With these standards, district courts can easily apply the bright-line rule to determine whether a prisoner's allegations would support a claim for restoration of good-time credits. The bright-line rule can be applied without focusing on relief currently sought, and without the need to resolve troublesome "fact-bound issue[s]" such as whether the claim would necessarily invalidate the result of the hearing, or whether the inmate is deliberately manipulating his pleadings. *Heck*, 114 S. Ct. at 2368-69 n.2.

By liberally construing the complaint in favor of habeas relief, a district court will ensure that inmates do not circumvent exhaustion with self-defeating allegations that they seek a federal forum to litigate claims for nominal and declaratory relief from purely procedural error. In addition, pro se inmates who act in good faith will be channelled towards the proceedings where they can best seek expedited and effective relief.

42 U.S.C. § 1988, also supports application of the bright-line rule to prisoner complaints. Under this statute, jurisdiction in civil rights actions must be exercised in a manner that is consistent with other federal statutes, to the extent that those statutes are also "suitable" to effectuate the purposes of § 1983. In relevant part, § 1988 provides that:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provision of this Title, and of Title "CIVIL RIGHTS" . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . ." 42 U.S.C. § 1988.

This statute provides additional authority for federal courts to define the principles of exhaustion that should apply when a prisoner attempts to bring a § 1983 claim that implicates the lawfulness of confinement.[15] 42 U.S.C. §

---

[15]When federal law is deficient in its ability to provide a suitable remedy, 42 U.S.C. § 1988 requires the federal courts to extend the common law. *See* § 1988, *Carey*, 435 U.S. at 258 n. 13. Because the

1988; *see also* 28 U.S.C. § 1651. This statute supports the conclusion that Balisok's § 1983 claim is not cognizable until he has first resolved its direct ramifications for his loss of good-time credits. Under § 1988, federal court jurisdiction must be exercised in conformity with § 2254. The civil rights statutes should be read against the background of habeas law which gives the states an opportunity to correct errors which may have resulted in unlawful confinement.

By requiring Balisok to seek habeas relief pursuant to § 2254, the district court will provide the most "suitable" solution for the "protection" and "vindication" of Balisok's civil right to due process, which exists to prevent the unlawful extension of a prisoner's confinement. Because this case involves a loss of liberty, the law of the United States that is most suitable is the exhaustion requirement. The exhaustion requirement effectuates the primary purpose of § 1983 -- vindication of constitutional rights and is easily applied by the district courts.

---

federal law of habeas corpus is not deficient, and does not displace the remedies of § 1983, extension of the common law is not necessary. An extension of common law would only be appropriate when, as in *Heck*, the extension is "not inconsistent with the Constitution and laws of the United States", 42 U.S.C. § 1988, including the requirement that a prisoner first exhaust a claim which attacks his duration of confinement.

C. Under Tort Law Principles, Balisok's § 1983 Claim Will Not Accrue Unless He First Prevails In A Habeas Corpus Action.

Principles of tort law provide a second and independent basis for barring Balisok's § 1983 action.[16] In *Heck*, this Court utilized principles of tort law to determine whether a § 1983 cause of action accrued. *Heck v. Humphrey*, 114 S. Ct. at 2370-72.

Heck sought damages under the premise that he was unlawfully convicted when state prosecutors "knowingly destroyed" evidence which was "exculpatory", and took other arbitrary actions during the prosecution of his case. *Heck*, 114 S. Ct. at 2368. Because success on these damages claims would necessarily demonstrate that Heck's confinement was unlawful, the Court subjected Heck's claim to the tort rule that such civil actions will not accrue until the plaintiff has obtained a "favorable termination" of the underlying criminal proceeding.[17] *Heck*, 114 S. Ct.

---

[16]In *Monroe v. Pape*, Justice Douglas concluded that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Since that time, the Court has described § 1983 as a "species of tort liability". *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986). Notwithstanding the foregoing, the task of adapting common-law tort rules of damages to actions for the deprivation of a constitutional right is one "of some delicacy." *Stachura*, 477 U.S. at 309, n. 13, *quoting Carey v. Piphus*, 435 U.S. at 258. Although § 1983 may create a species of tort liability, it should not be considered "a font of tort law". *Paul v. Davis*, 424 U.S. 693, 700-701 (1976). Tort rules of damages will not always provide a "complete solution" to every constitutional question. *Carey*, 435 U.S. at 258.

[17]In refusing to focus on the relief sought by Heck, this Court specifically rejected *dicta* in *Preiser* which suggested that prisoners might be able to pursue a civil rights claim for damages rather than

at 2371-72.

This favorable termination rule is based upon the strong judicial policy against conflicting resolutions arising from the same transaction.[18] *Heck*, 114 S. Ct. at 2371, *citing* 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, p. 24 (1991). When a § 1983 complaint is based upon allegations of unlawful action which would necessarily render the plaintiff's conviction or sentence invalid, the conflict is apparent and the § 1983 action will not accrue until the underlying basis for confinement is "declared invalid by the state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus".[19] *Heck*, 114 S. Ct. at 2372.

The tort principles that barred Heck's challenge to a conviction would also prevent accrual of § 1983 challenges to prison disciplinary proceedings. Although prison disciplinary proceedings are administrative and not criminal, the principles relied upon in *Heck* extend to administrative proceedings, which are properly subject to the same rules and limitations, including the rule of

---

injunctive relief. According to this Court, this dicta was "an unreliable, if not an unintelligible, guide". *Heck*, 114 S. Ct. at 2370.

[18]This policy is also consistent with this Court's abstention doctrines. *See* n.7, *supra* p. 15.

[19]The Court also indicated that § 1983 claims which would not necessarily invalidate a sentence or conviction may proceed if the federal court "determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff". *Heck*, 114 S. Ct. at 2372 (emphasis in original). The bright-line rule is consistent with this conclusion. If a district court can determine in advance that success will have no effect on the prisoner's sentence, then the plaintiff's complaint clearly will not support a claim for restoration of good-time credits, making exhaustion unnecessary.

favorable termination. *Miller v. Indiana Dept. of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996); *see* Prosser and Keeton on Law of Torts, § 120, pp. 891-893 (5th Ed. 1984).

Balisok's § 1983 claim falls under the favorable termination rule of *Heck* because, if successful, his challenge will necessarily call into question his loss of good-time credits. Much like Heck, Balisok claimed that state officials knowingly deprived him of the opportunity to present exculpatory evidence in his defense. App. I-4 to I-6; *see also* App. H-7 to H-14, and H-17 to H-18. In his original complaint, Balisok specifically sought restoration of good-time credits. App. H-31 to H-32. In his witness list, Balisok summarized testimony which, if believed, would exonerate him from guilt. Balisok was asserting he was innocent, which would necessarily invalidate his sanction and restore his good-time credits.

The amended complaint abandoned the request for good-time credits and sought relief in the form of a declaration that the procedures employed violated his right to due process, an injunction to prevent future violations, and compensatory and punitive damages for the "harm sustained from the use of unconstitutional procedures." App. I-9 to I-10. At the same time, Balisok explicitly reserved the right to challenge the loss of good-time credits at another time. App. F-4.

Despite Balisok's careful amendments, the district court recognized the nature of the alleged procedural violations, if proven, would necessarily invalidate the resulting loss of good-time credits.

> "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

Far more than procedural technicalities, Balisok alleges clear and serious violations of *Wolff*'s minimal due process protections. Specifically, he alleges a practice by prison officials designed to frustrate the ability of jailhouse lawyers to present exculpatory evidence through witness statements.[20] App. I-4; *see Wolff*, 418 U.S. at 566 ("the inmate facing disciplinary hearings should be allowed to call witnesses and present documentary evidence in his defense . . ."). Such a practice, if proven, would require the restoration of Balisok's good-time credits.

The federal courts will restore lost good-time credits if the asserted due process violation is indicative of arbitrary action by the prison hearing officer, or substantially interferes with the prisoner's ability to present exculpatory evidence.[21] *See Kingsley v. Bureau of*

---

[20]Balisok describes the alleged unconstitutional practice as follows:

> "The prison officials at the correctional institution do not date stamp witness statements which are made in reference to a 'jail house attorney.' . . . The prison officials do not stamp the statement so that in the event of a due process challenge for failure to call witnesses, a prison official may counter the challenge by saying the witness report was not submitted or was submitted late." App. I-4.

[21]Nor would Balisok's claims be subject to harmless error analysis. Under *Elkin v. Fauver*, harmless error will not be available if the procedural error is indicative of a pattern or practice of unlawful procedures. *Elkin v. Fauver*, 969 F.2d 48, 53 (3rd Cir. 1992) ("In the absence of a recent pattern of violations, it is entirely inappropriate to overturn the outcome of a prison disciplinary proceeding because of a procedural error without making the normal appellate assessment as to whether the error was harmless or prejudicial."); *accord Hayes*, *supra*. Balisok alleged that his inability to present exculpatory evidence at the disciplinary hearing was part of a recent pattern of violations by prison officials. *See* n.20, *supra* p. 30.

Prisons, 937 F.2d 26, 31 (2nd Cir. 1991) (sanction could not stand due to arbitrary denial of witnesses); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980) (expungement required where "defects in the procedures . . . significantly affected Hayes' ability to demonstrate his innocence").

State law requires the same result. Much like a federal court, Washington courts require prison officials to provide prisoners with an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals. *In re Burton*, 80 Wn. App. 573, 585, 910 P.2d ___, *review denied*, ___ Wn.2d ___ (1996).

A Washington appellate court would reverse the decision and sanctions of a state disciplinary hearing officer if confronted with the arbitrary procedural violations alleged by Balisok:

> "[E]ven lofty goals cannot excuse the entire lack of due process and the arbitrary manner in which these hearings were conducted with the resultant punishments. The findings and sanctions imposed against each petitioner must be set aside."

In re Hunter, 43 Wn. App. 174, 177, 715 P.2d 1146 (1986); *see also In re Reismiller*, 101 Wn.2d 291, 298, 678

P.2d 323 (1984) ("Thus, the committee's finding is reversed and the cause remanded with directions that the superintendent grant a new disciplinary hearing consistent with the requirements of this opinion.").[22]

Balisok's allegations, if established, would necessarily invalidate the result of his prison disciplinary hearing. As a result, his claim is properly analogized to the tort of malicious prosecution, under which a civil claim will not accrue until the plaintiff receives a favorable termination in a state or federal habeas corpus proceeding.

D. Requiring Balisok's § 1983 Claim To Be Dismissed Is Not Inconsistent With *Wolff v. McDonnell.*

Neither the application of the bright-line rule requiring exhaustion nor the application of the favorable termination requirement in *Heck* are inconsistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974).

First, application of the bright-line rule requiring exhaustion is not inconsistent with *Wolff* in this case because *Wolff* involved a court-certified class action containing broad-based challenges to established and undisputed procedures of the Nebraska corrections system. The claims in *Wolff* were allowed to proceed without exhaustion after a class action had been certified. Not all members of the prisoner class lost good-time credits. As a result, there were plaintiffs who were entitled to seek

[22]Other states will also reverse prison disciplinary proceedings for prison officials' failure to follow the standards discussed in *Wolff*. *See, e.g., People v. Superior Court*, 230 Cal. App. 3d 1592, 1595, 281 Cal. Rptr. 900, 902 (1991); (regarding the sufficient impartiality of the hearing officer); *Dumas v. State*, 654 So.2d 48, 49 (Ala. 1994) (reversal of prison disciplinary hearing where inmate was not afforded a qualified right to call witnesses).

review under § 1983 because their claims would not support a claim for lost good-time credits of a prior hearing. Thus, *Wolff*'s result is perfectly consistent with a rule of exhaustion that would bar an individual plaintiff from bringing a § 1983 action even though he or she has dropped (or momentarily failed to plead) a viable claim for restoration of good-time credits.

Wolff's distinguishing features were present in other cases where this Court allowed review under § 1983 without requiring exhaustion. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (class action § 1983 challenge to undisputed Florida procedures under which persons are detained under a prosecutor's information without any opportunity for a probable cause determination); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) (class action § 1983 challenge to undisputed Nebraska procedures under which prisoners are denied release on parole).

Circuit courts have required exhaustion of claims that were similar to Balisok's claim, recognizing the distinguishing features of *Wolff*. *Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116, 1118-19 (5th Cir. 1987) (concluding that *Wolff* must be read in light of its "immediate implications ... to broad-based class action challenges" on general rules and procedures) *citing Alexander v. Ware*, 714 F.2d 416 (5th Cir. 1983); *Offet v. Solem*, 823 F.2d 1256, 1260 (8th Cir. 1987) (distinguishing *Wolff* as a case where the relief provided was "entirely prospective in nature", and was not intended to effect "review of the state's prior disciplinary decisions").

Further, through the process of class certification, the district court may exercise discretion and ensure that the prisoners seeking prospective relief from allegedly unconstitutional disciplinary procedures are not merely

attempting to evade exhaustion by labeling their pleadings in a certain way. *See generally O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States Parole Com'n v. Geraghty*, 445 U.S. 388 (1980); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (discussing the basic thresholds for class certification in § 1983 actions). This threshold eliminates the incentive for prisoners to allege anything, including a broad-based procedural violation, in order to by-pass exhaustion and obtain immediate federal review of a specific state prison disciplinary hearing.

Balisok is a lone litigant challenging the constitutionality of a specific disciplinary proceeding. Until his claim is subsumed within the context of a certified class action, he must exhaust his habeas corpus remedies before proceeding on a prospective challenge to the prison disciplinary procedures which have extended his confinement.

Second, in this case, application of *Heck*'s favorable termination requirement is not inconsistent with *Wolff*. In *Heck*, this Court barred Heck's damages claim because he had not obtained a favorable termination with respect to his underlying basis of confinement. This Court distinguished *Wolff* as a case where there was not "any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits." *Heck*, 114 S. Ct. at 2370. The same distinction holds true here. As in *Heck*, the serious procedural violations alleged by Balisok would necessarily vitiate the denial of Balisok's good-time credits. *See* argument C, *infra*, p. 27. Under principles of tort law, Balisok must successfully exhaust habeas corpus remedies before his § 1983 claim will even accrue.

Two independent grounds support dismissal of Balisok's § 1983 claim. Neither is inconsistent with *Wolff*.

VII. CONCLUSION

The Petitioners respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be reversed, and that Respondent Balisok be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Kathleen D. Mix*
Talis Merle Abolins
William Berggren Collins
Mary E. Fairhurst
Daniel J. Judge
Assistant Attorneys General
Counsel of Record*
Counsel for Petitioners

P.O. Box 40116
Olympia, Washington 98504-0116
(360) 586-1445

June 1996

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTION PRESENTED

When a prisoner's claim under 42 U.S.C. § 1983 seeks only damages and injunctive relief for prison administrative procedures that violate the Due Process Clause, and does not seek any judicial determinations which would necessarily imply the invalidity of the disciplinary hearing result, or duration of confinement, as mandated by *Heck v. Humphrey,* must the prisoner first succeed in overturning the unaffected disciplinary hearing result or sanction?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE CASE 1

II. PROCEEDINGS BELOW 3

III. SUMMARY OF ARGUMENT 6

IV. ARGUMENT 11

A. Mr. Balisok's § 1983 Complaint is the Type of Lawsuit Permitted by This Court's Ruling in Heck v. Humphrey 11

B. Mr. Balisok's § 1983 Complaint is Precisely the Type of Procedural Due Process Challenge that is Permitted Under Wolff 17

C. Finding that Mr. Balisok was Deprived of Procedural Due Process Would Not Necessarily Imply the Invalidity of His Disciplinary Hearing Result 21

D. Finding That Mr. Balisok Was Deprived of Procedural Due Process Would Not Preclude the State Court From Conducting an Independent Review in a Habeas Corpus Challenge 26

E. A § 1983 Lawsuit That Does Not Implicate the Prison Hearing Result or Sanction Requires No Prior Successful Challenge ... 27

F. An Amended Complaint Entirely Supersedes the Original Complaint 30

TABLE OF CONTENTS – Continued

Page

G. This Court Should Not Overrule Wolff v. McDonnell and Heck v. Humphrey by Adoption of Petitioners' Proposed Rule ... 34

1. Petitioners' Proposed Rule Is Unworkable 34

2. Petitioners' Proposed Rule Would Deny Prisoners Any § 1983 Relief for Procedural Due Process Claims 36

3. Prisoner § 1983 Claims for Violations of Procedural Due Process Will Not Interfere with Prison Administration 40

H. Congress is the Proper Governmental Body to Add Limitations and Exhaustion Requirements to § 1983 41

1. Congress Has Addressed the States' Concerns For § 1983 Prisoner Claims 44

I. 42 U.S.C. § 1983 Recognizes the Fundamental Role of the Federal System in Protecting Those Constitutional Rights Guaranteed to All Citizens, Even Prisoners 46

V. CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) 37

Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995) 34

Berkovitz v. United States, 486 U.S. 531 (1988) 1

Best v. Kelly, 39 F.3d 328 (D.C. Cir. 1994) 35

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 34, 35, 41

Black v. Coughlin, 76 F.3d 72 (2nd Cir. 1996) 34

Boelens v. Redman Homes, 759 F.2d 504 (5th Cir. 1985) 30

Bounds v. Smith, 430 U.S. 817 (1977) 31

Bourgeois v. Murphy, 119 Idaho 611, 809 P.2d 472 (1991) 5

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 38

Carey v. Piphus, 435 U.S. 247 (1978) 8, 28, 29, 30

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 11

Cleavinger v. Saxner, 474 U.S. 193 (1985) 41

Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995) 38

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 39

Cort v. Ash, 422 U.S. 66 (1975) 31

Daniel v. Fields, 66 F.3d 338 (10th Cir. 1995) 35

Dog Essence Saladin Amin v. Pruett, ___ F.Supp. ___, Civ. No. A. 2:94CV635, 1996 WL 341522 (E.D. Va. June 12, 1996) 35

TABLE OF AUTHORITIES – Continued

Page

Elkin v. Fauver, 969 F.2d 48 (3d Cir. 1992) 16

Farmer v. Brennan, 511 U.S. 825 (1994) 11

Farrar v. Hobby, 506 U.S. 103 (1992) 29, 30

Federal National Mortgage Association v. Cobb, 738 F.Supp. 1220 (1990) 30

Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992) 30

Fry v. UAL Corp., 895 F.Supp 1018 (N.D. Ill. 1995) 32

Fuentes v. Shevin, 407 U.S. 67 (1972) 13

Giakoumelos v. Coughlin, ___ F.3d ___, 1996 WL 362708 (2d Cir. 1996) 38

Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995) 12, 28, 35

Haines v. Kerner, 404 U.S. 519 (1972) 33

Hawkins v. Risley, 984 F.2d 321 (9th Cir. 1993) 37

Heck v. Humphrey, 114 S.Ct. 2364 (1994) ..... *passim*

Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988) *vacated and remanded on other grounds*, 504 U.S. 25 (1992) 46

In re Burton, 80 Wash. App. 573, 910 P.2d 1295 (1996), rev. denied ___ Wash. 2d ___ (1996) 5, 21, 24

In re Hunter, 43 Wash. App. 174, 715 P.2d 1146 (1986) 21, 23

In re Reismiller, 101 Wash. 2d 291, 678 P.2d 323 (1984) 5, 21, 22, 23

Jones v. Moore, 996 F.2d 943 (8th Cir. 1993) 37

TABLE OF AUTHORITIES – Continued

Page

King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987) 30

Lato v. Sieverman, 919 F.Supp. 336 (N.D. Cal. 1996) 37

Lewis v. Casey, 64 U.S.L.W. 4587, 1996 WL 340797 (1996) 1

Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967) 30

Madrid v. Gomez, 889 F.Supp. 1146 (N.D. Cal. 1995) 47, 48

Martin v. Sias, ___ F.3d ___, No. 95-36118, 1996 WL 368840 (9th Cir. 1996). 35

Martucci v. Taylor, 59 F.3d 170 (6th Cir. 1995). 34

McCarthy v. Madigan, 503 U.S. 140 (1992). 42

McGrew v. Texas Bd. of Pardons, 47 F.3d 158 (5th Cir. 1995) 35

Miller v. Indiana Dept. of Corr., 75 F.3d 330 (7th Cir. 1996) 34

Mireles v. Waco, 502 U.S. 9 (1991) 1

Patsy v. Board of Regents, 457 U.S. 469 (1982) ... 10, 41, 42

Petition of Anderson, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, 493 U.S. 1004 (1989) ... 5, 21, 23, 24

Petition of Fogle, 128 Wash. 2d 56, 904 P.2d 722 (1995) 12

Petition of Johnston, 109 Wash. 2d 493, 745 P.2d 864 (1987) 5, 21, 24

Preiser v. Rodriguez, 411 U.S. 475 (1973) 17, 18, 31, 36, 44

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 38

TABLE OF AUTHORITIES – Continued

Page

Rhodes v. Hannigan, 12 F.3d 989 (10th Cir. 1993) 37

Rooding v. Peters, 876 F.Supp. 946 (N.D. Ill. 1995) 37

Sandin v. Conner, 115 S.Ct. 2293 (1995) 12

Sheldon v. Hundley, 83 F.3d 231 (8th Cir. 1996). 35

Superintendent, Mass. Corr. Institution v. Hill, 472 U.S. 445 (1985) 7, 13, 24, 25, 34, 41

Tate v. Dubois, 78 F.3d 577 (1st Cir. 1996). 34

Tower v. Glover, 467 U.S. 914 (1984). 45

United States v. Herron, 45 F.3d 340 (9th Cir. 1995) 23

Washer v. Bullitt Co., 110 U.S. 558 (1884) 31

Wolff v. McDonnell, 418 U.S. 539 (1974). ..... *passim*

Wright v. West, 505 U.S. 277 (1992). 37

Younger v. Harris, 401 U.S. 37 (1971). 38

STATUTES AND REGULATIONS:

28 U.S.C. § 1738 ..... 9, 27, 36

28 U.S.C. § 2254 8

28 U.S.C. § 2254(b) 26

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1997 ..... 41, 42, 43, 44

42 U.S.C. § 1997e(a)(b) 42, 44

Fed. R. Civ. P. 15(a) 31

Fed. R. Civ. P. 23(c)(2)(A) 17

TABLE OF AUTHORITIES – Continued

Page

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101(a) [§§ 801-810], 110 STAT 1321 (1996) 41, 42, 43, 44, 45

Wash. Admin. Code § 137-28-160 ..... 1, 12

Wash. Admin. Code § 137-28-350 12

Wash. Rev. Code § 9.94A.150(1) 12

Wash. Rev. Code § 9.95.080 12

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV, § 1 4

MISCELLANEOUS:

141 Cong. Rec. S7498-01, S7524-27 (May 25, 1995) 43

141 Cong. Rec. S10876-02, S10895-96 (July 28, 1995) 43

141 Cong. Rec. S14611-01, S14611-29 (September 29, 1995) 43

141 Cong. Rec. S18295-02, S18295-96 (December 8, 1995) 43

American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992) 34, 35

H.R. Conf. Rep. No. 96-897, p.9, Pub. L. 96-247, 1980 U.S.C.C.A.N. 787 42

TABLE OF AUTHORITIES – Continued

Page

Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417 (1993) 21, 22, 46

Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 De Paul L. Rev. 85, 154-157 (1988) 19, 20

Michael Weinman, Note, *To Stay or Not to Stay: Choosing A Procedural Course For Prisoners' Suits Stating Claims Under Both Section 1983 And Habeas Corpus*, 21 Mem.St. U. L. Rev. 733 (1991) 27, 39

Sol Wachtler, *The Prison Odyssey of Sol Wachtler*, N.Y. Times, March 10, 1996, § 4 at 1 48

Statement of Daniel E. Lungren, Attorney General of California, 1995 WL 18450 (F.D.C.H.), p.9 (January 19, 1995) 43

I. STATEMENT OF THE CASE

Respondent, Jerry Balisok, was improperly deprived of his qualified constitutional right to present witnesses at a prison hearing in which he was sanctioned by the revocation of thirty (30) days of earned good-time credits.[1]

Mr. Balisok alleges that Washington State Penitentiary ("WSP") officials date-stamp witness statements received in conjunction with prison disciplinary hearings.[2] Pet. App. I-4. However, in a punitive measure against "jail house attorneys"[3] involved in disciplinary hearings, WSP corrections officers have an unwritten policy and practice of not date-stamping the witness statements for those hearings. *Id.* at I-4. This practice permits corrections officers to conceal witness statements while claiming that the statement was received late, or not at all. *Id.* at I-4. This pattern and practice, which does not serve any legitimate institutional interest or objective, led to Mr. Balisok's § 1983 claim.

---

[1] Petitioners admit that Respondent Balisok has a liberty interest in his earned good-time credits. *See* Wash. Admin. Code § 137-28-160 (1996); Pet. Br. 5, n.2.

[2] The allegations in Mr. Balisok's Amended Complaint are accepted as true on review of a Motion to Dismiss. "Because the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in petitioners' complaint as true. . . . " *Berkovitz v. United States*, 486 U.S. 531, 540 (1988); *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Lewis v. Casey*, 64 U.S.L.W. 4587, 1996 WL 340797, *8 (1996).

[3] During the proceedings below, it was judicially noted that Mr. Balisok is known as a "jail house attorney." Pet. App. F-3.

On August 4, 1993, Mr. Balisok was alleged to have violated the prison disciplinary code. Pet. App. I-3. He was moved into administrative segregation. *Id.* Following an investigation, he was charged with four violations of that code. *Id.* at I-3. Later that same day, Balisok was notified that a disciplinary hearing would be conducted on September 2, 1993. *Id.* In preparation for his defense, Mr. Balisok asked the hearing officer, Petitioner Gary Edwards, to obtain a witness statement from inmate John Stein, and to submit questions to inmates Harris and Pulley. *Id.* at I-3, I-5.

At the disciplinary hearing, Edwards told Mr. Balisok that inmate Stein did not submit a witness statement, and that inmates Harris and Pulley had refused to respond to the questions. Pet. App. I-4, I-5. This was not true. *Id.* at I-4, I-6. At the same hearing, Mr. Balisok was found guilty. *Id.* at I-6. The prison disciplinary hearing based its decision on: 1) documentary evidence from an investigation; 2) testimony presented at the hearing; and 3) a written report by a Custody Unit Supervisor. Pet. App. K-1 to K-3. Mr. Balisok was sanctioned with ten days of isolation, twenty days of segregation, and the revocation of thirty days of good time. *Id.* at K-3.

Mr. Balisok timely pursued his administrative remedies. He submitted an appeal to the Superintendent, Petitioner Tana Wood, which was rejected as being too long. Pet. App. I-7. Mr. Balisok resubmitted his appeal, along with a letter of explanation. *Id.* This appeal was ignored by prison officials. *Id.* at I-8. Mr. Balisok then filed a grievance alleging that his sanctions were about to

be imposed while his appeal was still pending. *Id.* Petitioner Edwards summarily dismissed that appeal without notice to Petitioner, Superintendent Wood. *Id.* at I-8.

After completing the sanctions imposed, Mr. Balisok was permitted to review his central file. Pet. App. I-4. In that file, Mr. Balisok found all three witness statements dated prior to the hearing. *Id.* at I-4 to I-6. None of these statements had been date-stamped in conformance with the usual prison policy. *Id.* at I-4. Mr. Balisok's Amended Complaint alleges that pursuant to an unlawful policy, Petitioner Edwards intentionally denied Mr. Balisok the right to present this evidence in his defense. *Id.* at I-9.

On October 19, 1993, Mr. Balisok petitioned Superintendent Wood for the opportunity to appeal. Pet. App. I-8. Petitioner Wood responded in a Superintendent Memorandum that the disciplinary ruling and sanctions would stand without any explanation to support her denial of the appeal. *Id.* This deprived Mr. Balisok of a record that would be necessary for a judicial review of the administrative proceedings. *Id.* at I-9, I-10. The final denial of review also exhausted Mr. Balisok's administrative remedies.

II. PROCEEDINGS BELOW

On December 10, 1993, Mr. Balisok filed a *pro se* § 1983 Complaint in the United States District Court for the Eastern District of Washington. Pet. App. at H-1. This Complaint was filed against Petitioners Edwards and

Wood under 42 U.S.C. § 1983 (1979)[4] for violation of Mr. Balisok's right to due process under the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1; Pet. App. H-1, H-2.

Petitioners filed a Motion for a Stay of Proceedings on March 28, 1994. District Court Docket Entry (hereinafter "D.E.") 12. The District Court ordered Defendants' Motion stayed, pending this Court's decision in *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). Pet. App. E-1, E-2. Following the decision in *Heck*, Petitioners Edwards and Wood filed a Motion to Dismiss on August 19, 1994. D.E. 33.

Counsel was appointed to represent Mr. Balisok on September 12, 1994. D.E. 37. On October 28, 1994, along with a Memorandum in Response to Defendants' Motion to Dismiss, counsel for Mr. Balisok filed an Amended Complaint. D.E. 39; Pet. App. at I. The Amended Complaint cured the deficiencies in Mr. Balisok's *pro se* Complaint and conformed the Complaint to the requirements of *Heck*.[5] *Id.* at I. The Amended Complaint superseded

---

[4] 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

[5] Petitioners' Question Presented implies that there is disagreement as to whether the *Heck* decision extends to prison disciplinary hearings. Respondent has never argued that the *Heck* analysis should not be the basis of the determination of Mr. Balisok's case. The rulings of the District Court (Pet. App. F) and the Ninth Circuit below (Pet. App. A) both applied *Heck* as the controlling law. The issue in this case has always been whether a successful determination of Mr. Balisok's Amended Complaint would necessarily imply the invalidity of his prison hearing result and sanctions under the *Heck* analysis.

and nullified the original Complaint and primarily seeks declaratory and injunctive relief, along with damages, for a policy and practice of due process violations. *Id.* at I-2, I-10.

On February 6, 1995, the District Court entered an Order Denying Defendants' Motion to Dismiss, and stayed Mr. Balisok's Complaint. Pet. App. F-1. The District Court reasoned that a stay was required because a finding that the disciplinary procedures violated due process would also require the restoration of good-time credits. Pet. App. F-11, F-12. The District Court did not consider Washington State's adherence to the "some or any evidence" standard with regard to prison disciplinary hearings.[6] The District Court also incorrectly characterized Balisok's Complaint as seeking damages for the loss of good time. *Id.* at F-12. The District Court certified the case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. *Id.* at F-15. On November 22, 1995, the Ninth Circuit reversed and remanded.

---

[6] *In re Burton*, 80 Wash. App. 573, 910 P.2d 1295 (1996), rev. denied ___ Wash. 2d ___ (1996); *Petition of Anderson*, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, *Anderson v. Washington*, 493 U.S. 1004 (1989); *Petition of Johnston*, 109 Wash. 2d 493, 745 P.2d 864 (1987); *In re Reismiller*, 101 Wash. 2d 291, 678 P.2d 323 (1984); *but cf. Bourgeois v. Murphy*, 119 Idaho 611, 809 P.2d 472 (1991).

Pet. App. A-2. The Ninth Circuit, applying *Heck v. Humphrey*, concluded that Mr. Balisok's challenge to the procedure by which he was denied good-time credits did not necessarily imply the invalidity of his continuing confinement and therefore was not barred. Pet. App. A-2. Because of the Motions to Dismiss and Request for Stays filed by Petitioners, no formal discovery has been conducted or permitted in this case.

This Court granted Mr. Balisok's motion to proceed *in forma pauperis* and granted certiorari on April 29, 1996.

III. SUMMARY OF ARGUMENT

A. Prisoners in state custody have the right under 42 U.S.C. § 1983 to challenge unconstitutional practices and conditions of a state prison system so long as the lawsuit does not necessarily imply the invalidity of a prison disciplinary hearing result or length of confinement. *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). Respondent, Jerry Balisok, filed an Amended Complaint against state officials seeking declaratory relief, injunctive relief, and damages for the unconstitutional practice of denying "jail house attorneys" access to collected witness statements. Mr. Balisok's Amended Complaint limits his claims to unconstitutional procedures and falls precisely within the permissible boundaries of *Heck v. Humphrey*. The *Heck* decision recognized the importance of permitting § 1983 claims for procedural due process violations when it reaffirmed *Wolff v. McDonnell*, 418 U.S. 539 (1974).

B. In *Wolff v. McDonnell*, lower courts were instructed to determine the validity of procedures for revoking good-time credits and to fashion appropriate

remedies for any constitutional violations, short of ordering the actual restoration of lost good-time credits. *Wolff*, at 555. Mr. Balisok's Amended Complaint seeks only relief for the procedural due process violations suffered as part of the prison procedures used in the revocation of his earned good-time. Nowhere in his Amended Complaint can allegations be found attacking the disciplinary hearing result or sanctions. Mr. Balisok's Amended Complaint seeks only determination of, and relief for, procedural conduct impermissible under *Heck* and *Wolff*.

C. A finding in Mr. Balisok's favor on all of the allegations in his § 1983 Complaint will not necessarily imply the invalidity of his prison disciplinary hearing result or sanctions. Washington courts follow the "some or any evidence" standard when reviewing prison disciplinary hearings. Under this standard, if there is any evidence in the record to support the prison hearing determination, then the court will not undertake an entire review of the record and will uphold prison hearing results. *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985). Mr. Balisok's prison disciplinary hearing record shows independent sources of evidence that the hearing officer used to support his determination. Mr. Balisok has never asked the state courts to review his hearing result or sanctions. However, since Mr. Balisok's Amended Complaint only attacks procedure, a ruling in Mr. Balisok's favor under § 1983 would not require or even imply that his hearing or sanctions should be reversed by a state court.

D. A favorable district court determination of a prisoner § 1983 suit for procedural due process violations

will not preclude a state court from arriving at an independent determination of the related issues under habeas corpus law. Under 28 U.S.C. § 2254, the preclusion doctrine will not apply to a state habeas corpus hearing if its application prevents the state court from accomplishing an independent habeas corpus review. *Heck*, 114 S.Ct. at 2372 n.9.

E. The common law of torts and specifically the malicious prosecution analogy cited in *Heck* is inapplicable in a § 1983 challenge to procedural due process only. The § 1983 Complaint filed by Mr. Balisok is solely about violations of due process procedure. The proper analogous case is *Carey v. Piphus*, 435 U.S. 247 (1978). *Carey* and its progeny recognize that an administrative hearing which can result in the loss of a constitutional interest invokes an absolute right in procedural due process even if the hearing result was correct.

F. It is hornbook law that an amended complaint supersedes and nullifies the original complaint unless the amended complaint specifically incorporates by reference allegations of the original complaint. Mr. Balisok's Amended Complaint does not incorporate directly or by inference any of the allegations of the original Complaint. Petitioners have mistakenly supported their argument with citations to the irrelevant original Complaint and associated pleadings. Mr. Balisok's Amended Complaint is the only cognizable Complaint in this case, and it properly sets forth a claim under § 1983 for violations of procedural due process.

G.1. Petitioners propose a new rule for this Court to adopt in prison disciplinary hearings which would

require the overruling of *Heck v. Humphrey* and *Wolff v. McDonnell*. There is no apparent need for this new rule since the test set out in *Heck* is clear, unambiguous, and easy for lower courts to apply. The only purpose for the new rule offered by Petitioners is to create a judicial barrier to the federal forum that Congress has made available to prisoners under § 1983.

G.2. Federal courts under 28 U.S.C. § 1738 are required to give preclusive effect to issues decided by state courts. The effect of adopting Petitioners' proposed rule would be to preclude federal court review of legitimate constitutional violations. Likewise, crafting an abstention doctrine to § 1983 claims would have the same effect of denying state prisoners access to a federal court for constitutional violations in state prisons. The Petitioners' proposed rule should be rejected because it is a vague, overly broad, and unworkable rule which, by virtue of the preclusion doctrine, eradicates an important federal remedy.

G.3. Allowing prisoners to go forward with § 1983 claims will not interfere with prison administration or the independent functioning of state courts. Mr. Balisok is simply asking the District Court to find that a practice of lying and cover-ups by prison officials, which denies prisoners the right to present witnesses, is wrong. Mr. Balisok's allegations do not encroach on legitimate prison discipline or administration issues. The proper solution in due process cases such as this one is to require prison officials to afford inmates the qualified due process rights the inmates still possess.

H. This Court has held that exhaustion requirements should not be judicially imposed upon § 1983 claims. *Patsy v. Board of Regents*, 457 U.S. 469 (1982). Congress is the proper body to restrict prisoner access to federal court. It has responded to State concerns and exercised its legislative prerogative recently with the Prison Litigation Reform Act of 1995. This Court should refrain from imposing any additional judicial restrictions in light of Congress's recent amendments affecting prisoner § 1983 cases.

I. 42 U.S.C. § 1983 recognizes the important and fundamental right of the federal government to preserve the basic rights and liberties embodied in the United States Constitution. Petitioners and State Amici repeatedly refer to federal-state comity in their effort to persuade this Court to impose a broad rule effectively denying § 1983 claims for prisoners suffering due process violations. This argument ignores the basic fact that some federal-state conflict is inherent in § 1983. The occasions for abuse of due process in the prison setting are numerous and the federal courts must have the opportunity to protect the limited and qualified constitutional rights remaining with state prisoners.

Accordingly, the judgment of the Ninth Circuit Court of Appeals should be affirmed and Mr. Balisok should be permitted to proceed in federal court with his § 1983 claim for violations of procedural due process.

IV. ARGUMENT

A. Mr. Balisok's § 1983 Complaint is the Type of Lawsuit Permitted by This Court's Ruling in Heck v. Humphrey.

In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), this Court held that a § 1983 claim which would not necessarily imply the invalidity of a conviction should be allowed to proceed. 114 S.Ct. at 2372. The Court stated that a claim for using the wrong procedures, rather than one for reaching the wrong result, could be just such a claim. *Id.* at 2370 (reaffirming *Wolff v. McDonnell*, 418 U.S. 539 (1974)).

Mr. Balisok's § 1983 Amended Complaint alleges that WSP officials engage in an ongoing pattern of conduct, that of not date-stamping witness statements for "jail house attorneys." Pet. App. I-4, I-9. This practice deprives those prisoners of their qualified due process right to introduce witness statements in their defense at prison disciplinary hearings. This pattern and practice led to the constitutional deprivation for which Mr. Balisok has filed suit.[7]

His prison disciplinary hearing resulted in a loss of thirty days earned good-time credit. While Mr. Balisok cannot challenge the loss of his good-time credits in this

---

[7] Mr. Balisok, a "jail house attorney," has a stake in the outcome of this case because the violation of his civil rights from the procedures alleged in his § 1983 Amended Complaint is likely to recur. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *See also Farmer v. Brennan*, 511 U.S. 825 (1994). Mr. Balisok's 240-month sentence began in September of 1989. Pet. Br. at 2.

proceeding, the liberty interest associated with his earned good-time credits does permit a § 1983 claim for the procedural due process violation.[8]

Mr. Balisok's Amended Complaint also alleges that Superintendent Wood summarily dismissed Mr. Balisok's appeal without stating any basis for her decision. Pet. App. I-8. A stated basis is required when a prisoner is deprived of a liberty interest protected under the Fourteenth Amendment. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). This is to prevent arbitrary and capricious conduct by prison officials, and to enable a reviewing court to properly assess whether due process was accorded. *Wolff*,

---

[8] Petitioners concede that there is a liberty interest in earned good time (Pet. Br. 5 n.1) because inmates of the Washington State Department of Corrections (DOC) have a statutorily created right to earn good time for good behavior and good performance. Wash. Rev. Code § 9.94A.150(1) (1996); *Petition of Fogle*, 128 Wash. 2d 56, 59, 904 P.2d 722, 724 (1995). Once good time has accrued to an inmate, it may be revoked or reduced upon a finding that the inmate has committed a serious infraction. Wash. Admin. Code § 137-28-160 (1996). However, because earned good time represents a liberty interest, the correctional facility is required to provide the qualified due process accorded to prisoners under both *Wolff v. McDonnell* and the relevant Washington State Codes before revocation or reduction. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); Wash. Rev. Code § 9.95.080 (1996); Wash. Admin. Code § 137-28-350 (1996). In *Sandin v. Conner*, this Court reaffirmed the *Wolff* liberty interest principles. *Sandin v. Conner*, 115 S.Ct. 2293, 2300 (1995). The Ninth Circuit has found Washington's good-time scheme to be indistinguishable from "Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v. McDonnell* found to confer a liberty interest on inmates." *Gotcher v. Wood*, 66 F.3d 1097, 1100 (9th Cir. 1995).

at 564; *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 454 (1985).[9]

Mr. Balisok's Amended Complaint seeks only a declaration that his procedural due process rights were violated, injunctive relief to prevent this type of conduct in the future, and damages for the violation of those rights. Pet. App. I-10. Mr. Balisok specifically does not challenge the result of the prison disciplinary hearing, or seek damages for that result. He also does not challenge the punishment assessed in that hearing, or the results of his appeal. *Id.* at I-9, I-10. Therefore, a successful § 1983 claim in this case will not demonstrate the invalidity of Mr. Balisok's disciplinary hearing or sanctions.

In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), the Court considered whether a state prisoner could challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. *Heck*, 114 S.Ct. at 2368. Unlike Mr. Balisok, the prisoner in *Heck* never timely challenged "the description of his monetary claims (by both the District Court and the Court of Appeals) as challenging the legality of his conviction." *Id.* at 2369 n.2. Mr. Balisok does not challenge the legality of his conviction in his Amended Complaint and has repeatedly objected to such a characterization by the petitioners and the District Court. Pet. App. I; D.E. 39, 53.

---

[9] These due process rules are necessary to minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected liberty interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Heck directly addresses the issue of Mr. Balisok's § 1983 Amended Complaint:

> In light of the earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think this passage [in *Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). . . . Thus, the claim at issue in *Wolff* did not call into question the lawfulness of the plaintiff's continuing confinement.

114 S.Ct. at 2370 (citations omitted).

Mr. Balisok's challenge to the witness statement date-stamping procedures, which are unconstitutional and deprive him and other "jail house attorneys" of civil rights, is exactly the type of challenge approved in *Heck*. His Amended Complaint does not challenge the fact of his conviction, the lawfulness of his continuing confinement, or his loss of good time, but seeks only declaratory relief, injunctive relief, and damages for the ongoing violations of procedural due process.

In *Heck*, this Court set forth the test the lower courts must use when analyzing a prisoner § 1983 claim:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether the judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if

> successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 2372 (footnotes omitted).

Applying the *Heck* test to the Amended Complaint filed by Mr. Balisok shows that success in his § 1983 action will not demonstrate the invalidity of any outstanding disciplinary hearing or loss of good time.

Justice Scalia gave two examples to assist lower courts when deciding these very issues. 114 S.Ct. at 2373 nn.6-7. A § 1983 suit for violation of the Fourth Amendment right to be free from unlawful arrest has to negate an element of a conviction for resisting arrest in order to be successful. *Id.* at 2373 n.6. This type of § 1983 suit is therefore not allowed under *Heck*.

To illustrate the type of § 1983 suit which would be allowed under *Heck*, the Court stated:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery . . . , and especially harmless error . . . , such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Heck, 114 S.Ct. at 2373 n.7 (citations omitted).

Mr. Balisok's Amended Complaint epitomizes this Court's example in footnote 7. Proper application of the

Heck test requires a three-step analysis by the District Court. First, does the nature of Mr. Balisok's Complaint attack the validity of the prison hearing result or sanction? No. It only attacks an unconstitutional procedure used against "jail house attorneys" which is not an element of the offense. Second, will the state court be compelled to reverse the result or sanctions arising from Mr. Balisok's disciplinary hearing based on the District Court's ruling? No. Washington's use of the "some or any evidence" standard insulates the hearing result and sanctions from most procedural attacks.[10] *See* section C, *infra*. Third, does the relief requested challenge or contradict the validity of the prison hearing result or sanctions? No. Mr. Balisok is not seeking any damages for the result of the hearing or the sanctions, only relief for the procedural due process violations.

When each part of this three-step analysis is answered in the negative, then a decision in a § 1983 prisoner claim will not necessarily imply the invalidity of the prison disciplinary hearing or sanctions and should be allowed to proceed in District Court.

---

[10] Other examples of this would be independent source, inevitable discovery, and harmless error as recognized in footnote 7 of *Heck*. *Id.* at 2373 n.7. Petitioners cite to *Elkin v. Fauver*, 969 F.2d 48 (3d Cir. 1992), in order to advance their argument that Balisok's claims would not be subject to harmless error. Pet. Br. 30 n.21. *Elkin* is inapposite since in that case the court had been vacating sanctions that resulted from the prison administration's repeated intentional violations of a court-ordered consent decree.

B. Mr. Balisok's § 1983 Complaint is Precisely the Type of Procedural Due Process Challenge that is Permitted Under Wolff.

Wolff v. McDonnell is the leading Supreme Court case to address directly the type of facts surrounding Mr. Balisok's claims. 418 U.S. 539 (1974). *Wolff* involved a class action brought by prisoners alleging that the rules, practices, and procedures at the prison, which might result in the taking of good time, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 542-43. Prisoners sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with the withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of allegedly unconstitutional procedures.[11] *Id.* at 553.

In *Wolff*, the Court citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), affirmed that a § 1983 lawsuit is the proper vehicle for prisoner damages claims. 418 U.S. at 554. The

---

[11] Petitioners argue that procedural due process claims are limited to class-action cases. Pet. Br. 33. It is hard to imagine exactly what petitioners are claiming since a class action is simply an efficient way to handle identical or related individual claims. Class actions even permit an opt-out by individual claimants. Fed. R. Civ. P. 23(c)(2)(A). Furthermore, the test Petitioners cite with approval as assuring the legitimacy of claims in class certification is identical to the test district courts apply to individual prisoner claims. Pet. Br. 33-34. If district courts have the ability to determine the legitimacy of class-action claims, they certainly have the same ability in individual claims.

decision in *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings.[12] *Wolff*, 418 U.S. at 554.

> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

418 U.S. at 555 n.13.

Mr. Balisok's claims fall squarely within this permitted area. Specifically with regard to the right of a prisoner to call a witness (or present a witness statement) in his defense at a disciplinary hearing, the *Wolff* Court said: "We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566.

In Mr. Balisok's case, there is no legitimate institutional or correctional basis for denying "jail house attorneys" access to prisoner statements that have already been prepared and collected. It is simply a scheme to

---

[12] In this regard *Preiser's* basic holding remains unchallenged and supports Mr. Balisok's right to bring his § 1983 claim. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

subvert the qualified due process rights retained by prisoners. The *Wolff* Court was concerned about subversion of prisoner rights when it stated: "Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." 418 U.S. at 566.

Mr. Balisok's allegations present this Court with the type of official conduct the *Wolff* Court sought to prevent. The record does not set forth a reason for refusing to provide Mr. Balisok access to the witness statements collected by the prison officials. Petitioner Edwards told Mr. Balisok that the statements were not returned by the prisoners. Mr. Balisok alleges that Petitioner Edwards' statement was false. Pet. App. I-4, I-6. Mr. Balisok seeks a declaration that such conduct is unconstitutional. He also seeks an injunction to prevent the conduct from recurring in the future and damages for the deprivation of his qualified due process rights. *Id.* at I-10. This is exactly the type of claim allowed in *Wolff*, as reaffirmed by *Heck*. *Heck*, 114 S.Ct. at 2370.

When a prisoner lawsuit is limited to a procedural due process issue and the relief requested is associated only with the procedural due process claim, the lawsuit does not infringe on the area in which habeas corpus is the exclusive remedy. Professor Schwartz recognized this in his extensive article about the habeas/§ 1983 dichotomy:

> [T]he Supreme Court's . . . decisions in *Wolff v. McDonnell* and *Gerstein v. Pugh* provide substantial, if not conclusive, support for the proposition that procedural due process claims that do

> not seek immediate or speedier release from prison may be asserted under section 1983.
>
> . . .
>
> Prisoner claims that contest the absence or the sufficiency of the standards used by prison officials in making determinations, challenge the manner in which those determinations are made and, if successful, do not automatically terminate or shorten the length of confinement. Most courts, therefore, properly treat these claims as procedural due process claims that may be asserted under § 1983.

Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 De Paul L. Rev. 85, 155-157 (1988) (citations omitted).

Professor Schwartz also addressed the minority of courts which have held that a due process challenge to procedure alone should be barred and habeas corpus held to be the exclusive remedy:

> This view, however, misses the essential points: (1) that a prisoner who seeks procedural protections is not asking for immediate or speedier release; and (2) that the adjudication of the sufficiency of the procedural due process requirements does not attack the constitutionality of a prisoner's confinement.

Id. at 157 (citations omitted).

It cannot be disputed that the allegations raised in Mr. Balisok's Amended Complaint amount to illegitimate actions of prison officials concerning a due process right. However, since his claims do not attack his continuing

confinement, Mr. Balisok's Amended Complaint is exactly the type of narrowly drawn procedural due process claim permitted under *Wolff* and *Heck*.

C. Finding that Mr. Balisok was Deprived of Procedural Due Process Would Not Necessarily Imply the Invalidity of His Disciplinary Hearing Result.

If Mr. Balisok succeeds in showing that his qualified due process rights were violated in a successful § 1983 action, a state court will not be required to reverse Mr. Balisok's hearing determination. Washington law applies the "some or any evidence" standard to the review of prison disciplinary hearings, and has done so consistently since *In re Reismiller* was decided in 1984. *In re Reismiller*, 101 Wash. 2d 291, 678 P.2d 323 (1984) (en banc); *see also In re Hunter*, 43 Wash. App. 174, 715 P.2d 1146 (1986); *Petition of Johnston*, 109 Wash. 2d 493, 745 P.2d 864 (1987); *Petition of Anderson*, 112 Wash. 2d 546, 772 P.2d 510 (1989), cert. denied, *Anderson v. Washington*, 493 U.S. 1004 (1989); *In re Burton*, 80 Wash. App. 573, 587, 910 P.2d 1295, 1305 (1996), rev. denied, ___ Wash. 2d ___ (1996). Under the "some or any evidence" standard, if there is any evidence in the record to support the prison hearing determination then the court will uphold the decision. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 433-34 (1993).

> Once a prisoner has been found guilty of a disciplinary violation, a reviewing court cannot reweigh the evidence considered by the prison

> administrators. Rather, the imposition of discipline will be upheld if supported by "some evidence." . . . [T]he relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. This is the most deferential standard of review under which the factual determination of the prison administrators will be upheld in the very large majority of situations.

Id. at 433-34 (citations omitted).

The record of Mr. Balisok's hearing shows that the determination was made on the basis of the documentary evidence from an investigation, testimony presented at the hearing, and a written report by a Custody Unit Supervisor. Pet. App. K-1, K-3, L-1, L-4. With this evidence, Mr. Balisok's hearing results will not necessarily be reversed nor will his good-time credits necessarily be restored by a state court based on a finding of a due process violation.

Petitioners cite *Reismiller* to support their contention that a § 1983 finding in Mr. Balisok's favor would dictate reversal of his disciplinary hearing outcome. Pet. Br. 31. To the contrary, *Reismiller* stands for the proposition that the arbitrary and capricious standard of review, used in reviewing prison disciplinary proceedings, turns not on the "sufficiency of the evidence but on whether any proper evidence at all was presented." 101 Wash. 2d at 296, 678 P.2d at 326. "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.* In *Reismiller*, the disciplinary hearing was set aside because the court found that there was no

evidence in the record which linked Reismiller with the infraction. *Id.* at 297, 678 P.2d at 326. In Mr. Balisok's case, there is "some or any evidence" that the state court on independent review could use to uphold the hearing result and sanction. Pet. App. K-2.

Similarly, Petitioners cite *Hunter* implying that the holding demonstrates that Mr. Balisok's hearing would necessarily be reversed. *Hunter*, 43 Wash. App. 174, 715 P.2d 1146 (1986); Pet. Br. 31. However, in *Hunter*, the disciplinary hearing determination was reversed because the court found that the State's characterization of "the evidence as 'meager' [was] generous . . . . There was no evidence taken at either hearing." *Hunter*, at 177, 715 P.2d at 1147. Evidence was taken at Mr. Balisok's hearing and therefore this case does not support Petitioners' contention.[13]

Other Washington cases firmly establish the "some or any evidence" rule. In *Anderson*, the plaintiff argued that the finding of the disciplinary hearing did not even meet the "some or any evidence" standard of due process, because there was no direct evidence connecting him with the infraction. *Anderson*, 112 Wash. 2d at 549, 772 P.2d at 512. In spite of this, the court used the doctrine of

---

[13] The facts of each case are as important to understanding the case's holding and relevance as are quotes taken from the case to support a different set of facts before the court. "The language of a decision is used to explain why the particular result follows from the concrete facts of the case, and must be read with reference to the dispute before the court in that case. Karl N. Llewellyn, *The Bramble Bush 36* (1930). Mining decisions for quotations out of context does not amount to an argument." *United States v. Herron*, 45 F.3d 340, 342 (9th Cir. 1995).

"constructive possession," and upheld a determination of Anderson's guilt that was based on the fact that contraband was found in a cell that he shared with three other inmates. *Id.* at 549-552, 772 P.2d at 512-513. In *Burton*, despite the prisoner's contention that the hearing did not meet the "some or any evidence" standard, and a showing of procedural "irregularities," the disciplinary hearing was not overturned. *Burton*, 80 Wash. App. at 598, 910 P.2d at 1306. The court reaffirmed the "some or any evidence" standard used in Washington and also by this Court in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985), to support its conclusion:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. *Johnston*, 109 Wash. 2d at 497, 745 P.2d 864 (quoting *Hill*, 472 U.S. at 453, 105 S.Ct. at 2772-73). A prison disciplinary hearing is arbitrary and capricious only if no evidence supports the action taken. *Anderson*, 112 Wash. 2d at 549, 772 P.2d 510.

In re Burton, at 587-88, 910 P.2d at 1305-06.

All of these cases show that under Washington law, a disciplinary hearing will not be reversed if there is "some or any evidence" in the record to support the finding of

the disciplinary board. The "some or any evidence" standard was recognized and adopted by this Court in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. at 454 (1985). In *Hill*, this Court characterized the evidence as "meager," but, nonetheless, found it to be constitutionally sufficient under the peculiar circumstances of a prison.[14] *Id.* at 457. This Court gives great deference to the exigencies of prison administration by permitting a much lower standard of due process with regard to prison disciplinary hearings. *Id.* at 555-56.

Mr. Balisok claims he was denied access to witness statements. Assuming the witness statements contain information suggesting Mr. Balisok was not guilty of the prison infraction, they would present, at most, a second opinion or view as to his guilt or innocence. However, the fact that there exist two opinions which may offer conflicting evidence is insufficient to reverse a prison hearing determination. Despite petitioners' efforts to convince this Court otherwise, Washington case law does not support Petitioners' contention that Mr. Balisok's disciplinary hearing would have to be reversed by a state court if he wins his § 1983 claim. A Washington court will be free to look at all of the evidence and come to an independent result based on state law.

---

[14] *Hill* also demonstrates that Petitioners' argument that federal law will somehow require the state court to reverse the prison disciplinary hearing result fails as well. Pet. Br. 30-31.

D. Finding That Mr. Balisok Was Deprived of Procedural Due Process Would Not Preclude the State Court From Conducting an Independent Review in a Habeas Corpus Challenge.

Petitioners and State Amici argue that a successful § 1983 claim may, because of preclusion, dictate the outcome of subsequent litigation in state court. Pet. Br. 28-29; Brief of States' Amici Curiae, ("State Am. Br.") 16. They use this argument to support their contention that these types of claims must be considered only as habeas corpus claims, which would thus be subject to state court exhaustion requirements. However, state courts do not have to follow or adopt the district court findings from a § 1983 case. *Heck*, 114 S.Ct. at 2373.

A favorable district court determination of a prisoner § 1983 suit for procedural due process violations will not preclude a state court from arriving at an independent determination of the related issues under habeas corpus law. The federal court will not be ruling on the sufficiency of the evidence presented at the disciplinary hearing. Only the state court makes this determination. Federal law requires that a prisoner exhaust state remedies before filing a federal habeas corpus complaint. 28 U.S.C. § 2254(b). As stated in *Heck*, 28 U.S.C. § 2254(b) expressly authorizes a state court to conduct an independent determination, even if the same issues or facts were litigated in a § 1983 claim. *Heck*, 114 S.Ct. at 2373. If the § 1983 judgment conflicts with the independent § 2254(b) state review, preclusion may not even be "a permissible effect." *Id.* at 2373.

The basis for the state's right to reach an independent conclusion in a habeas corpus case was recently discussed:

> No federal authority, however, requires state courts to give federal decisions a preclusive effect. The full faith and credit clause of the United States Constitution requires only that state courts give the judgments of a sister state the same preclusive effect that the rendering state would give it. The full faith and credit statute, 28 U.S.C. section 1738, speaks only to the federal courts. A state could adopt an approach that would allow it to ignore a federal court's decision in a section 1983 claim. This would give the state court the first opportunity to correct the errors in the administration of its prisons, while also protecting the prisoners' section 1983 right of a federal forum to redress deprivations of federal rights.

Michael Weinman, Note, *To Stay or Not to Stay: Choosing A Procedural Course For Prisoners' Suits Stating Claims Under Both Section 1983 And Habeas Corpus*, 21 Mem.St. U. L. Rev. 733, 753-54 (1991).

The issue preclusion argument of Petitioners and State Amici should be rejected now, just as it was in *Heck*. 114 S.Ct. at 2373.

E. A § 1983 Lawsuit That Does Not Implicate the Prison Hearing Result or Sanction Requires No Prior Successful Challenge.

Petitioners' argument that a prisoner should be required to obtain reversal of the results of a hearing

before challenging unconstitutional procedures is not supported by analogy to tort law or § 1983 itself. Unlike a malicious prosecution claim and the claim at issue in *Heck*, a claim that prison procedures violate the Due Process Clause does not directly challenge the merits of the decision in the proceeding. *Wolff*, 418 U.S. at 554. For example, a prisoner may prevail by showing that the procedures violate due process and is not required to also show that the violations are so severe that the court should reverse the decision on the merits. *Wolff*, 418 U.S. at 554.

Moreover, requiring that the merits of the decision be overturned as a prerequisite to challenging unlawful procedures would effectively foreclose many actions, despite the damage inflicted by such unlawful procedures. For example, if a prisoner is released from custody shortly after the prison disciplinary proceeding or during the pendency of a suit, the prisoner will not be able to pursue a habeas challenge to overturn the results because the prisoner would not be in custody for habeas corpus purposes.[15] *See Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995); *Heck*, 114 S.Ct. at 2379 (Souter, J., concurring). Consequently, under Petitioners' theory, the ongoing due process violations would be immune from review and an action for damages would be foreclosed.

The distinction this type of case presents was addressed in *Carey v. Piphus*, 435 U.S. 247 (1978). In *Carey*,

---

[15] In this example, the good time cannot be restored through habeas and the remedy becomes damages under § 1983 as in *Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995). *See* ACLU Am. Br. § II.

respondents were high school students who were suspended from school without due process of law in violation of the Fourteenth Amendment. *Id.* at 249. "The complaint sought declaratory and injunctive relief, together with actual and punitive damages in the amount of $3,000.00." *Id.* at 250. This Court "granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." 435 U.S. at 253. In addressing this question, the Court affirmed that 1) substantial nonpunitive damages must be supported by proof of actual injury, *id.* at 262; 2) exemplary or punitive damages are available to a plaintiff in a proper case under § 1983, *id.* at 257 n.11; and 3) the right to procedural due process is absolute and a violation of this right always supports an award of damages, even if nominal. *Id.* at 266-67.

The Court specifically addressed the right to damages for violations of procedural due process:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . , we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266-67 (citations omitted; footnotes omitted).

In *Farrar v. Hobby*, this Court reaffirmed the principles of Carey: "Doubtless, 'the basic purpose of a § 1983 damages award should be to compensate persons for

injuries caused by the deprivation of constitutional rights.' " *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (quoting *Carey*, 435 U.S. at 254).

Mr. Balisok's lawsuit for procedural due process violations alleges conduct that is independent of the results of the prison disciplinary hearing. At trial it will be his burden to prove damages: actual, punitive and/or nominal, as well as evidence sufficient to support his claims for declaratory and injunctive relief. Likewise, his claim for procedural due process violations is absolute and can proceed without proof of a successful challenge to his prison hearing determination.

F. An Amended Complaint Entirely Supersedes the Original Complaint.

Petitioners continually make reference to Mr. Balisok's original Complaint and witness list as if they have some relevance or legal effect that this Court must consider. Pet. Br. *passim*. They make only passing reference to the Amended Complaint that was the subject of the decisions below. Pet. Br. 5, 13, 20. However, it is a "well-established doctrine" that an amended pleading supersedes the original pleading. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Once an amended complaint supersedes the original complaint, the original complaint is thereafter treated as nonexistent. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Boelens v. Redman Homes*, 759 F.2d 504 (5th Cir. 1985); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *Federal National Mortgage Association v. Cobb*, 738 F.Supp. 1220, 1227 (N.D. Ind. 1990). A party's pleadings may be amended once as a matter of course at any

time before a responsive pleading is served. Fed. R. Civ. P. 15(a). In this case, Mr. Balisok's Amended Complaint was filed on October 28, 1994, prior to Petitioners filing an Answer to the *pro se* Complaint. *See* J.A., List of Relevant Docket Entries, pp. 1-2.

Mr. Balisok's Amended Complaint does not incorporate either explicitly, or by reference, any of the allegations in the original Complaint. These allegations were specifically deleted from the Amended Complaint as required by case law and court rules and cannot be considered by the Court.[16] However, since only the original *pro se* Complaint has allegations which could be considered claims requiring exhaustion of state court remedies, the Petitioners have focused on this non-existent Complaint to support their exhaustion arguments.[17] *Cf. Washer v. Bullitt Co.*, 110 U.S. 558, 559 (1884). (A plaintiff cannot be prejudiced by the fact that the claim in the original petition was for a sum less that such would bring the case within the jurisdiction of the court.)

---

[16] After the *Heck* decision, the District Court specifically sought out counsel to become Mr. Balisok's attorney in this case. D.E. 37. Once qualified counsel had the opportunity to review the original *pro se* Complaint, the record, and relevant case law, failure to amend Mr. Balisok's *pro se* Complaint to conform to the law as set forth in *Heck*, *Wolff*, and *Preiser* could have been the subject of Rule 11 sanctions and would have been malpractice. *See Bounds v. Smith*, 430 U.S. 817, 825-26 (1977).

[17] By premising their arguments upon Balisok's original Complaint, Petitioners are also asking this Court to deviate from its "normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Cort v. Ash*, 422 U.S. 66, 72 (1975).

Equally irrelevant is Mr. Balisok's *pro se* Witness List filed during proceedings on the original Complaint. J.A. 3. The *pro se* Witness List was superseded and nullified by the filing of the Amended Complaint. This issue was discussed in *Fry v. UAL Corp.*, 895 F.Supp 1018 (N.D. Ill. 1995) where plaintiffs in a securities case sought to use a superseded complaint and a court order based on the superseded complaint to prove that an allegation was properly before the court. *Id.* at 1047-48. The District Court rejected this attempt to use superseded pleadings:

> Thus, to the extent that plaintiffs rely on the Court's, the defendant's, or their own characterizations of the subject matter of this lawsuit prior to the filing of the amended complaint to support their contention that a duty to update claim has been part of this case all along, their efforts are misdirected.

Id. at 1048.

Mr. Balisok must assume that Petitioners attached these documents to the Joint Appendix, and emphasized them in their brief, in the hope that the Court will rely on them. However, they are of no legal relevance and should be ignored.

Petitioners also contend that Mr. Balisok's "reservation of the right to challenge the loss of good-time credits at another time" is further evidence of manipulative pleading and supports their "habeas in disguise" argument. Pet. Br. 21, 29. This ignores the fact that the only way Mr. Balisok could challenge the hearing results and punishment is through a separate claim under habeas

corpus. *See Wolff v. McDonnell*, 418 U.S. at 554. The footnote in Balisok's Memorandum in Response to Defendants' Motion to Dismiss, (D.E. 39, p.5) simply reserves that right. Had Mr. Balisok not reserved his right, then upon the filing of a later habeas corpus petition in state court, the first argument raised by defendants would be waiver.[18]

Because Mr. Balisok has acted in a legally responsible and prudent manner, he is accused of manipulative pleading. Pet. Br. 21. This Court has recognized that it is necessary to liberally construe the *pro se* pleadings of a prisoner and provide them an opportunity to amend to state valid claims whenever possible. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Unfortunately, the Attorneys General of Washington and seventeen other states seek to draw an "iron curtain"[19] between the constitution and the prisoners of this country by characterizing Mr. Balisok as the archetype of the manipulative "jail house attorney."

In determining whether or not Mr. Balisok's Amended Complaint necessarily implies the invalidity of his prison disciplinary hearing, it is the Amended Complaint and subsequent pleadings only that have legal

---

[18] As as matter of record, Mr. Balisok has never filed a state court challenge to his 1993 disciplinary hearing result and sanctions.

[19] [A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. *Wolff v. McDonnell*, 418 U.S. 539, 55-56 (1974).

significance, not the superseded original Complaint or superseded pleadings.[20]

G. This Court Should Not Overrule Wolff v. McDonnell and Heck v. Humphrey by Adoption of Petitioners' Proposed Rule.

1. Petitioners' Proposed Rule Is Unworkable.

The principles articulated in *Heck v. Humphrey* provide lower courts with clear guidance for classifying prisoner complaints. In concert with *Wolff*, *Heck* set out a rule that is clear, unambiguous, and easy to apply. *See* Resp. Br. §§ A, B. A § 1983 claim for damages is not cognizable if it necessarily[21] implies the invalidity of the underlying conviction. Lower courts have not had any difficulty applying this test.[22]

---

[20] This is hornbook law which should have been brought to this Court's attention in Petitioners' Brief on the Merits. *See Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 457-58 (1985) (Stevens, J., concurring in part and dissenting in part).

[21] The key word in the *Heck* test is "necessarily," which is defined as: of necessity; inevitably. Necessary: Absolutely essential; Needed to achieve a certain result or effect; requisite; logically inevitable. Imply: to involve by logical necessity; entail. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[22] Petitioners' request to overrule *Heck* implies that the *Heck* test is unworkable and is creating a split among the Circuits. A survey of the Federal Circuits shows unanimity in applying *Heck* to prison disciplinary hearings, parole hearings, and *Bivens* actions. Disciplinary Hearing: *see Tate v. Dubois*, 78 F.3d 577, (1st Cir. 1996); *Black v. Coughlin*, 76 F.3d 72 (2nd Cir. 1996); *Martucci v. Taylor*, 59 F.3d 170 (6th Cir. 1995); *Miller v. Indiana Dept. of Corr.*, 75 F.3d 330 (7th Cir. 1996); *Armento-Bey v.*

Petitioners claim that this rule is difficult to apply, and propose instead to overrule both *Heck* and *Wolff*. Petitioners offer an ambiguous and inconsistent rule that would require a district court to engage in nothing more than rank speculation. Under the proposed tests, the court would dismiss when a prisoner's allegations "could[23] also support a claim for restoration of good-time credits," no matter what the relief requested. Pet. Br. 7. Alternatively, if the prisoners' allegations "would[24] state a claim under habeas corpus" (*id.* at 17), or "would support a claim under habeas corpus" (*id.* at 24), the district court must dismiss.[25] It will be impossible for district

---

Harper, 68 F.3d 215 (8th Cir. 1995); *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996); *Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995); *Daniel v. Fields*, 66 F.3d 338 (10th Cir. 1995); *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994); District Court: e.g., *Dog Essence Saladin Amin v. Pruett*, ___ F.Supp. ___, Civ. No. A. 2:94CV635, 1996 WL 341522 (E.D. Va. June 12, 1996); Parole Hearings: *e.g., McGrew v. Texas Bd. of Pardons*, 47 F.3d 158 (5th Cir. 1995); *Bivens* Actions: *e.g., Martin v. Sias*, ___ F.3d ___, No. 95-36118, 1996 WL 368840 (9th Cir. 1996).

[23] Petitioners' first operative word is "could," defined as: used with hypothetical or conditional force; used to indicate tentativeness. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[24] Alternatively, Petitioners use "would," which is defined as: used to indicate uncertainty. American Heritage Dictionary of the English Language (Houghton Mifflin Company, 3d ed. 1992).

[25] The standard proposed by State Amici is at least a bit clearer: No right to federal protection of constitutional rights with regard to disciplinary hearings under § 1983 for state prisoners. State Am. Br. *passim*.

courts to consistently distinguish where the "bright line" is drawn under this proposed rule.[26]

Petitioners also assert that their proposed rule is necessary to give the Courts, rather than the prisoner, the power to decide questions of federal court jurisdiction. Pet. Br. 19. However, the prisoner's decision is illusory and subtracts nothing from the federal court's power to determine the validity of claims. Under the *Heck* rule, the prisoner has only one choice for injunctive relief and damages for procedural due process violations: a § 1983 claim in Federal Court. If the prisoner wants the hearing result reviewed or restoration of good-time credits there is also only one choice: exhaustion of state habeas corpus remedies before seeking federal court review.

2. Petitioners' Proposed Rule Would Deny Prisoners Any § 1983 Relief for Procedural Due Process Claims.

Under 28 U.S.C. § 1738, federal courts are required to accord preclusive effect to issues decided by state courts:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts

[26] In addition, such a rule would provide "an undeniable, and in all likelihood irresistible, incentive for state prison officials to defeat the jurisdiction of the federal courts by adding the deprivation of good-time credits to whatever other punishment is imposed." *Preiser v. Rodriguez*, 411 U.S. at 509 (Brennan, J., dissenting).

> of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

Preclusive effect has been specifically applied to state court judgments in subsequent federal § 1983 claims, where a state court would do the same, *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980), and not to federal habeas corpus claims. *Wright v. West*, 505 U.S. 277 (1992). *See Lato v. Sieverman*, 919 F.Supp. 336 (N.D. Cal. 1996); *Rooding v. Peters*, 876 F.Supp. 946 (N.D. Ill. 1995); *Hawkins v. Risley*, 984 F.2d 321 (9th Cir. 1993); *Jones v. Moore*, 996 F.2d 943 (8th Cir. 1993). *But see Rhodes v. Hannigan*, 12 F.3d 989 (10th Cir. 1993).

In *Allen*, this Court held that where a party had a full and fair opportunity to litigate the claim or issue decided by a state court, the judgments would be given preclusive effect in subsequent federal § 1983 suits. *Id.* at 104.

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of the decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments . . . .

Allen v. McCurry, 449 U.S. 90, 96 (1980).

This Court was not concerned about preclusion encroaching on an exclusive federal remedy because a § 1983 plaintiff does not have to file first in state court. *Id.* at 103-04. However, adopting a rule which requires a § 1983 plaintiff to go to state court first would undermine

the very intent of § 1983 to provide a federal forum for deprivation of constitutional rights.

A recent Second Circuit opinion highlights the effect of requiring prisoners to seek habeas corpus relief even when the proper claim would be § 1983. *Giakoumelos v. Coughlin*, ___ F.3d ___, 1996 WL 362708, *6 (2d Cir. 1996). The *Giakoumelos* Court found that an inmate was collaterally estopped from raising a § 1983 claim because he "[c]hose to litigate his claims by way of an Article 78 proceeding. Collateral estoppel in a subsequent § 1983 action is one of the risks attendant to his decision to follow that route." *Id.* at *6. The court expressed its concern about preclusion of a valid § 1983 claim "given the procedural laxity of such prison hearings, and the limited nature of substantial-evidence review." *Id.* at *5, quoting *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995).

Adopting abstention to fit the proposed rule is likewise inappropriate because the prisoner § 1983 due process claim attacks only a procedure which violates a federal constitutional right. The determination of a violation of procedural due process in Mr. Balisok's case does not require interpretation of a difficult or unclear state law. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The State of Washington does not have an overriding interest in protecting federal constitutional rights nor do state courts have superior competence in federal constitutional law. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Mr. Balisok does not have an ongoing state proceeding in which he could obtain relief for the due process violations alleged in his Amended Complaint. *See Younger v. Harris*, 401 U.S. 37 (1971).

The rule of decision in Mr. Balisok's case is federal law and a decision in his case will not create piecemeal litigation because the subject matter and relief presented in his § 1983 claim is separate and distinct from what could be litigated in state court. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Federal courts have a "virtually unflagging obligation" to exercise their properly invoked jurisdiction absent the clear application of one of the established abstention doctrines. *Id.* at 817. None of the traditional abstention doctrines apply to Mr. Balisok's case and this Court should not create a new one by adoption of the Petitioners' test.

If abstention were important in prisoner § 1983 claims, Congress could have easily enacted such a provision in the latest round of legislative changes to prisoner litigation statutes. Resp. Br. § H.

> [A] prisoner's guarantee of a federal forum is infringed if the court stays the section 1983 action because, even under habeas corpus, federal courts are required to give state court findings of fact substantial deference. Requiring the federal court in the section 1983 claim to essentially adopt the state court's findings of fact would seriously undermine section 1983's guarantee of a federal forum because one of the purposes underlying the guarantee is mistrust of state fact-finding.

Weinman, *supra*, at 752. (citations omitted).

The Petitioners' proposed test would effectively deny many prisoners the very relief that Congress has specifically provided: that of a federal forum to redress certain constitutional violations. 42 U.S.C. § 1983 (1996).

3. Prisoner § 1983 Claims for Violations of Procedural Due Process Will Not Interfere with Prison Administration.

Petitioners contend that a district court decision will interfere with proper prison administration.[27] However, nothing in Mr. Balisok's case will lead to such a result. Mr. Balisok is asking the District Court to find that the practice of lying to inmates about the existence of witness statements and not "date-stamping" the witness statements in order to cover up the lying is unconstitutional and should be stopped. The prison system can still hold disciplinary hearings, exclude witnesses on legitimate grounds, and appropriately sanction the prisoner upon a determination of guilt. The only interference from the District Court would be to require that the prisoner receive the minimal due process already recognized by

---

[27] The argument that federal judges lack the expertise to run prisons rests on a misconception of the judiciary's role in prison cases. The invalidation of a particular prison practice on constitutional grounds rarely, if ever, requires a court to assume management of the penal institution. Courts are the experts in constitutional law, and that is the basic issue in most prison suits. To the extent that other expertise is needed for accurate decision making, courts have been willing to be informed by the arguments of counsel and the taking of testimony, including the testimony of expert witnesses.

this Court.[28] *Wolff v. McDonnell*, at 558; *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985).

H. Congress is the Proper Governmental Body to Add Limitations and Exhaustion Requirements to § 1983.

This Court has held that additional exhaustion requirements should not be judicially imposed upon § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 514 (1982). In *Patsy*, the Court pointed out that the very difficulty of the policy considerations involved in adding an exhaustion requirement to § 1983 and the vehement debate in which Congress engaged during the passage of the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, make it clear that "legislative, not judicial

---

[28] Petitioners and State Amici refer to the burden and expense of dealing with *pro se* prisoner complaints. The possibility of being swamped with frivolous petitions never has been deemed a valid excuse for denial of constitutional rights. Justice Harlan addressed this point when he wrote that fear of burgeoning caseloads cannot "be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Harlan, J, concurring). *See also Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). This issue was addressed recently in the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101(a) [§§ 801-810], 110 STAT 1321 (1996). Congress did not see fit to engraft a state court exhaustion requirement into § 1983. A more straight-forward way of dealing with burdensome prisoner § 1983 challenges to the procedures used in prison disciplinary hearings would be to require prison officers to "follow the clear and simple constitutional requirements of *Wolff v. McDonnell* . . . . " *Cleavinger*, 474 U.S. at 207.

solutions are preferable." *Id.* at 518.[29] *Cf. McCarthy v. Madigan*, 503 U.S. 140 (1992) (this Court refused to extend an exhaustion requirement to Bivens actions).

Judicially imposing a requirement that a prisoner must exhaust state court remedies before filing a § 1983 claim whenever the claim "could" also support a claim for restoration of good-time credits is also inconsistent with recently expressed congressional intent. *See* Prisoner Litigation Reform Act of 1995 ("PLRA"). Pub. L. No. 104-134, § 101(a) [§ 803(d), § 7(a)(b)], 110 STAT 13212 (1996). After lobbying by State Attorneys General, Congress recently amended 42 U.S.C. § 1997 to require prisoners to exhaust administrative procedures only, regardless of whether those procedures were federally certified. 42 U.S.C. § 1997e(a)(b) (1996). State Amici interpret the fact that Congress no longer limits the exhaustion requirement to prisons with certified grievance procedures as evidence that Congress "no longer has a mistrust for the fact finding processes of state institutions relied upon in reaching the no exhaustion rule announced in *Patsy*." State Am. Br. 12 n.7.

Congress had the opportunity to expand the "very narrow exhaustion requirement"[30] in the original enactment of § 1997 during the recent enactment of the PLRA. *Id.* During the process of testimony and debate with

---

[29] CRIPA was enacted primarily to ensure that the United States Attorney General would have "legal standing to enforce existing constitutional rights and federal statutory rights of institutionalized persons." H.R. Conf. Rep. No. 96-897, p.9, Pub. L. 96-247, 1980 U.S.C.C.A.N. 787, 790.

[30] *Patsy v. Board of Regents*, 457 U.S. at 508.

regard to this act, the attorneys general of several states had the opportunity to speak.[31] Nowhere in the record is there mention of limiting prisoners' use of § 1983 by adding a state court exhaustion requirement as the Attorneys General of Washington and State Amici now propose. State Am. Br. 11. Congress, by amending the exhaustion section of § 1997, considered to what extent exhaustion requirements were appropriate for prisoner § 1983 lawsuits. PLRA at § 803(d) § 7(a)(b). Given the fact that Congress did not adopt a requirement for state court exhaustion, the legislative history simply does not demonstrate the confidence in state court remedies that Petitioners and State Amici assert. In this case, the congressionally-mandated requirement for exhaustion of administrative remedies has been met by Mr. Balisok. Pet. App. I-8.

Congress also was satisfied with *Wolff* and *Heck* as the controlling law involving prisoner § 1983 lawsuits. In defining what § 1983 prisoner lawsuits were permissible, the PLRA states:

> The term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions

---

[31] The Congessional Record on enactment of the PLRA makes numerous references to statements or input from state Attorneys General on the PLRA. *See* 141 Cong. Rec. S7498-01, S7524-27 (May 25, 1995); 141 Cong. Rec. S10876-02, S10895-96 (July 28, 1995); 141 Cong. Rec. S14611-01, S14611-29 (September 29, 1995); 141 Cong. Rec. S18295-02, S18295-96 (December 8, 1995); Statement of Daniel E. Lungren, Attorney General of California, 1995 WL 18450 (F.D.C.H.), p.9 (January 19, 1995).

> of confinement or the effects of actions by governmental officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

PLRA, § 802(a)(g)(2), amending 28 U.S.C. § 3626.

This language adopted by Congress embodies the same legal standards articulated in *Preiser, Wolff,* and *Heck. See* Resp. Br. §§ A, B.

1. Congress Has Addressed the States' Concerns For § 1983 Prisoner Claims.

The States' concerns for limited resources and judicial economy were raised in Congress by the State Attorneys General. *See* n.31. Congress responded to this lobbying by amending § 1997 to include a number of new procedures and penalties for prisoners filing § 1983 lawsuits. Prisoners now have a financial risk with § 1983 lawsuits. Twenty-five percent of their judgment must go toward the payment of any attorney fee.[32] PLRA, § 803(d)(2), amending 42 U.S.C. § 1997e.

Prisoners proceeding *in forma pauperis* must now pay the full amount of the court filing fee with monthly payments equal to twenty percent (20%) of the prisoner's trust fund account. PLRA, § 804(b)(1), amending 28

---

[32] The "threat" that attorneys will also seek to circumvent habeas corpus remedies because of the attorney fee provision (Pet. Br. 22 n.13) has also been addressed by Congress. *See* PLRA, § 803(d). Additionally, Attorney of Record in this case accepted the District Court's appointment *pro bono*.

U.S.C. § 1915. Prisoners must also pay the full amount of any cost assessed against them out of their prison trust fund. PLRA, § 804(c)(2)(A),(B) amending 28 U.S.C. § 1915(f). Congress added a "three strikes" provision to stop multiple suits by a single prisoner. PLRA, § 804(d), amending 28 U.S.C. § 1915 to add new subsection (g). Subsection (g) prevents a prisoner who has filed three or more frivolous, malicious, or failure to state a claim lawsuits, while incarcerated or detained, from filing any civil action "unless the prisoner is under imminent danger of serious physical injury." PLRA, § 804(d), adding 28 U.S.C. § 1915(g). Any damage award to the prisoner must first be paid directly to satisfy any outstanding restitution order. PLRA, § 807. Prior to payment, notice must also be given to the victims of the crime for which the prisoner is incarcerated for payment of any compensatory damage award the victim has against the prisoner. PLRA, § 808.

"It is for Congress to determine whether § 1983 litigation has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover,* 467 U.S. 914 (1984). Congress has unequivocally exercised its prerogative to fashion limits on prisoner access to § 1983 lawsuits. The additional limits sought by Petitioners and their Amici should be addressed to Congress, not to this Court.

I. 42 U.S.C. § 1983 Recognizes the Fundamental Role of the Federal System in Protecting Those Constitutional Rights Guaranteed to All Citizens, Even Prisoners.

The federal courts recognize the importance of prison access to an independent federal forum for certain constitutional violations.

> We have become a more civilized society because of the protections [§ 1983] affords those under police arrest or confined to penal institutions. Thanks to § 1983, and concurrent prison reforms, we no longer tolerate the degrading experiences. . . . Nor do we tolerate the dehumanizing treatment that once existed in prisons, where an inmate was denuded of his dignity, stripped of his name, addressed by only an identification number, and constantly ran the risk of being brutally beaten or tossed into "the hole" indefinitely, at the sole whim of a prison guard.

Hernandez v. Denton, 861 F.2d 1421, 1428 (9th Cir. 1988) (Aldisert, Circuit Judge, dissenting), *vacated and remanded on other grounds*, 504 U.S. 25 (1992).

Federal courts permitted prisoner lawsuits under § 1983 when judges could no longer ignore the appalling conditions in state prisons. Eisenberg, *supra*, at 424. Many of the prison reforms that took place were a result of the federal courts' willingness to interpose themselves between the prisoners and the states in order to redress constitutional violations. *Id.*

Petitioners and State Amici suggest that state remedies are now adequate, and prisoner access to § 1983

is no longer necessary to protect prisoners' federal rights. Pet. Br. 23; State Am. Br. 3. This suggestion is not without contradiction. In *Madrid v. Gomez*, California prisoners sought injunctive and declaratory relief under 42 U.S.C § 1983. *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995). They challenged the constitutionality of a broad range of conditions and practices in the Pelican Bay prison. *Id.* at 1155. Finding in favor of the prisoners on many of their allegations, the court stated:

> Dry words on paper can not adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake.
>
> . . .
>
> Defendants have shown no indication that they are committed to finding permanent solutions to problems of serious constitutional dimension. On the contrary, defendants have expended most of their energies attempting to deny or explain away the evidence of such problems.
>
> . . .
>
> Indeed, the Court is left with the opinion that, even given the evidence presented at trial, defendants would still deny that any condition or practice at Pelican Bay raises any cause for concern, much less concern of a constitutional dimension.

Id. at 1280-81. It is in the wake of this case that State Amici propose a rule that would foreclose important § 1983 relief for prisoners.[33]

Petitioners and State Amici repeatedly refer to federal-state comity in their effort to persuade this Court to impose an exhaustion requirement that has never been legislatively written into § 1983. This argument ignores the basic fact that some federal-state conflict is inherent in § 1983. The Civil Rights Act's purpose is to create federal review of unconstitutional state practices. Federal courts are careful to defer to the state with regard to the management of prisons: "We must be careful not to stray into matters that our system of federalism reserves for the discretion of state officials." *Madrid*, 889 F.Supp. at 1279. However, the purpose behind § 1983 recognizes that there are times when it is necessary. "At the same time, we have no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff." *Id.*

---

[33] It is axiomatic that the structure of prison systems and the demeaning nature of prison life leads to conflict between prisoners and their keepers. The inherent power differential will result in abuse, sometimes of constitutional proportions. This is perhaps best illustrated by a line from the prison diary of Sol Wachtler, former Chief Judge of New York State: "Forget it: As prisoners, you will never be thought of as people." Sol Wachtler, *The Prison Odyssey of Sol Wachtler*, N.Y. Times, March 10, 1996, § 4 at 1.

V. CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

THOMAS H. SPEEDY RICE
Counsel of Record
GEORGE A. CRITCHLOW

Gonzaga Law School
University Legal Assistance
N. 1220 Dakota Street
Spokane, WA 99202
(509) 328-4220 x 3703
Counsel for Respondent

August 1996

Respondent wishes to specially acknowledge the contribution of Kristy Smith-Moffitt, law student.

Respondent also acknowledges the contribution of Kristine Balogh; David Fathi and John Midgley of Columbia Legal Services; David Rudovsky; Michael Tankersley of Public Citizen; Robin Toone of the Southern Center for Human Rights; and Charles Weisselberg.

(8)

NO. 95-1352

Supreme Court, U.S.
FILED
SEP 3 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

vs.

JERRY B. BALISOK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

KATHLEEN D. MIX*
TALIS MERLE ABOLINS
WILLIAM BERGGREN COLLINS
MARY E. FAIRHURST
DANIEL J. JUDGE
Assistant Attorneys General
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445
*Counsel of Record
Counsel for Petitioner

PETITION FOR CERTIORARI FILED FEB. 20, 1996
CERTIORARI GRANTED APRIL 29, 1996

23 pp

TABLE OF CONTENTS

I. BALISOK'S § 1983 CLAIM SHOULD BE DISMISSED 1

A. Introduction. 1

B. The Interrelationship Between Habeas Corpus and § 1983 Should Be Resolved Through the Application of the Bright-Line Rule. 2

1. Comity Dictates That State Courts Have the First Opportunity to Review Claims Involving Unlawful Confinement. . . . 3

2. The Only Reason Prisoners Have Due Process Rights in a Disciplinary Hearing is to Prevent an Arbitrary Loss of Liberty. 5

3. The Relief Section of a Prisoner's Complaint is an Unreliable Guide For Assessing the Nature of the Prisoner's Claim. 5

4. The Bright-Line Rule Is Based on Fed. R. Civ. P. 12(b)(6) and Easily Identifies the Nature of the Prisoner's Claim. . . 7

5. The Bright-Line Rule Does Not Impede Federal Review of Constitutional Violations Under § 1983. 10

6. The Bright-line Rule is Consistent With *Heck* Because it Addresses a Question Not Resolved by *Heck*'s Tort Analysis. 11

C. *Heck* Bars Balisok's § 1983 Claim. 13

D. Dismissal of Balisok's § 1983 Claim is Consistent With *Wolff*. 15

II. CONCLUSION. 17

TABLE OF AUTHORITIES

Cases — Page

Allen v. McCurry,
449 U.S. 90 (1980) 10

Conley v. Gibson,
355 U.S. 41 (1957) 8

Dog Essence Saladin Amin v. Pruett,
___ F. Supp. ___, 1996 WL 341522
(E.D. Va., June 12, 1996) 5, 15

Ex Parte Royall,
117 U.S. 241 (1886) 4

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S. 100 (1981) 2

H.J. Inc. v. Northwestern Bell Tel. Co.,
492 U.S. 229 (1989) 8

Heck v. Humphrey,
512 U.S. ___, 114 S. Ct. 2364 (1994) . . 1, 3, *passim*

In re Burton,
80 Wn. App. 573, 910 P.2d ___,
review denied, ___ Wn.2d ___ (1996) 14

In re Johnston,
109 Wn.2d 493, 745 P.2d 864 (1987) 14

Leonard v. Mississippi State Probation & Parole Bd.,
509 F.2d 820 (5th Cir.),
cert. denied, 423 U.S. 998 (1975) 16

Preiser v. Rodriguez,
411 U.S. 475 (1973) 2-6, 12

Project Release v. Prevost,
463 F. Supp. 1033 (E.D.N.Y. 1978) 16

Rose v. Lundy,
455 U.S. 509 (1982) 2-4

Sandin v. Conner,
___ U.S. ___, 115 S. Ct. 2293 (1995) 4

Superintendent, Mass. Corr. Institution v. Hill,
472 U.S. 445 (1985) 14

Tucker v. Montgomery Bd. of Comm'rs,
410 F. Supp. 494 (M.D. Ala. 1976) 17

Wolff v. McDonnell,
418 U.S. 539 (1974) 1, 13-16

Wood v. Gotcher,
Supreme Court No. 95-1385 5

Statutes & Regulations

28 U.S.C § 2254 . . . . . 1-3, 5, 6, 11, 12

28 U.S.C. § 1738 10

42 U.S.C. § 1983 . . . . . 1-4, 6, 7, 9-17

Prison Litigation Reform Act of 1995,
Pub. L. No. 104-134, § 805(a) (1996 8

Other Authorities

Fed. R. Civ. P. 12(b)(6) 7-9

Fed. R. Civ. P. 23(b)(3) 16

Fed. R. Civ. P. 54(d) 9

I. BALISOK'S § 1983 CLAIM SHOULD BE DISMISSED

A. Introduction.

Respondent Jerry Balisok was charged with violating the prison disciplinary code. After a hearing he was found guilty of the violations and lost 30 days of good-time credits. Balisok filed a civil rights action alleging that Petitioners (prison officials) violated his due process rights at the prison disciplinary hearing. There are two independent reasons why Balisok may not proceed with a civil rights action.

First, this case involves the interrelationship between the federal habeas corpus statute 28 U.S.C § 2254(b) and the federal civil rights statute 42 U.S.C. § 1983. In our opening brief we set out a bright-line rule to resolve the interrelationship of these two statutes. The bright-line rule is that exhaustion of state remedies is required whenever a prisoner's allegations, no matter what relief is requested, could also state a claim for relief from unlawful confinement. Pet. Br. 12-26. Under this rule, Balisok must pursue his habeas corpus remedy because his due process allegations state a claim for the restoration of good-time credits. Pet. Br. 27-32.

Second, the tort law analysis in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994) bars Balisok's § 1983 claim because that claim necessarily implies the invalidity of his loss of good-time credits. Pet. Br. 27-32.

Either of these reasons provide an independent basis to reverse the decision of the United States Court of Appeals for the Ninth Circuit. The opening brief also explained that these two reasons are consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Pet. Br. 32-34.

B. The Interrelationship Between Habeas Corpus and § 1983 Should Be Resolved Through the Application of the Bright-Line Rule.

The interrelationship of § 2254 and § 1983 has been a continuing source of conflict and confusion for the federal courts. Pet. 13-21; Pet. Reply 1-6. We propose a bright-line rule which clarifies the application of these two statutes when they overlap. Pet. Br. 12-26. In their responses, Balisok and the American Civil Liberties Union and other amici (ACLU) argue that adoption of the bright-line rule would constitute judicial rule making, and that this question should be left to Congress. Res. Br. 41-44; ACLU Br. 14-16.

Application of the bright-line rule is not improper judicial rule making. It is the proper role of this Court to construe the operation of two overlapping statutes. *Preiser v. Rodriguez*, 411 U.S. 475, 482-83, 489 (1973). Rather than engraft an exhaustion requirement onto § 1983, the bright-line rule merely defines the appropriate scope and application of an exhaustion requirement that has already been legislatively expressed in § 2254(b).[1]

Under § 2254(b), a prisoner is required to exhaust state habeas corpus remedies before pursuing a "writ of habeas corpus". Congress did not define "writ of habeas corpus". As a result, this Court requires exhaustion of any

[1]This Court also looks to the policies of comity in order to define the scope of the exhaustion requirement of § 2254(b). *Preiser v. Rodriguez*, 411 U.S. 475, 490-92 (1973); *Rose v. Lundy*, 455 U.S. 509, 516-18 (1982). The fundamental importance of comity was illustrated in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111-116 (1981), where this Court did judicially create a new rule of exhaustion based upon comity principles without any direct statutory basis. Although prison officials do not directly rely on *Fair Assessment*, its analysis illustrates that even without the statutory basis of § 2254(b), comity alone may require the same result.

claim which is properly categorized as an attack on the fact or duration of confinement. *Preiser*, 411 U.S. at 490, 500. Pet. Br. 13-14, 17-19. The bright-line rule properly identifies claims which attack the fact or duration of a prisoner's confinement by focusing on the nature of the claim itself, rather than the relief sought in the prisoner's complaint.[2]

In our opening brief we set out four reasons why this Court should adopt the bright-line rule to reconcile § 2254 and § 1983. Balisok has little response to some of these reasons and the arguments he makes are not well taken.

1. Comity Dictates That State Courts Have the First Opportunity to Review Claims Involving Unlawful Confinement.

In our brief we explained why the bright-line rule was necessary to preserve the fundamental principles of federal-state comity which underlie exhaustion. Pet. Br. 13-17. Balisok does not disagree that comity is a fundamental principle of federal-state relations. Instead, Balisok attempts to minimize the role of comity in this case by arguing that a favorable ruling under § 1983 will not have a *res judicata* effect in a subsequent state habeas corpus action. Res. Br. 26-27. This argument misses the point.

[2]The need to judicially harmonize the respective scope of § 2254 and § 1983 is also made necessary by the fact that application of both statutes has been expanded beyond the narrow scope originally intended by the drafters. *See Heck*, 114 S. Ct. at 2374-75. (Thomas, J., concurring); *Rose*, 455 U.S. at 548 n. 18 (Stevens, J., dissenting). To the extent that overlap results from this judicial expansion, this Court relies on a principled analysis of the general policies that underlie the statutes in order to resolve conflicts.

The fact that a state court may not be bound by a prior federal court ruling under § 1983 does not address the principles of comity that exhaustion is designed to protect. For over a century, this Court has recognized that federal courts should not consider a habeas claim "until after the state courts have had an opportunity to act". *Rose v. Lundy*, 455 U.S. 509, 515, (1982), citing *Ex Parte Royall*, 117 U.S. 241, 251 (1886). Contrary to Balisok's suggestion, comity is not satisfied by giving state courts a second, independent opportunity to address claims. The purposes of exhaustion and federal-state comity are only satisfied by giving state courts "the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492.

Comity and the public good require that federal-state relations "be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Rose*, 455 U.S. at 515, quoting *Royall*, 117 U.S. at 251. With or without *res judicata*, the principle of comity is frustrated if a state court is confronted with a federal court judgment that has already resolved the same issues against the same state officials. Where, as here, the prisoner's claim is by its very nature an attack on loss of liberty, Congress intended that state courts be given the first opportunity to consider the claim.[3]

---

[3]Balisok also argues that allowing his claims to proceed without exhaustion will not interfere with prison administration because a federal ruling on prison disciplinary procedures will not prevent prison officials from holding hearings and imposing appropriate sanctions. Res. Br. at 40. This also misses the point. Allowing Balisok to proceed without exhaustion will lead to greater federal intrusion in the area of state prison administration and deprive state courts of the first opportunity to correct any errors in the internal administration of a state prison disciplinary system. *Preiser*, 411 U.S. at 492; *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293, 2299-2300 (1995).

2. The Only Reason Prisoners Have Due Process Rights in a Disciplinary Hearing is to Prevent an Arbitrary Loss of Liberty.

The bright-line rule recognizes the primacy of the liberty interest which lies at the heart of a due process claim. Pet. Br. 17-19. The very purpose of due process at a disciplinary hearing is to prevent an arbitrary loss of good-time credits. Balisok agrees with this point and the ACLU does not debate it. Res. Br. 12-13 and n.9. Without a deprivation of the good-time credits, Balisok would have no procedural rights at all.[4] Pet. Br. 17-19. By its very nature, Balisok's procedural due process claim is an attack on the deprivation of liberty itself. As such it must first be addressed in a habeas corpus action.

3. The Relief Section of a Prisoner's Complaint is an Unreliable Guide For Assessing the Nature of the Prisoner's Claim.

Our brief also explained why application of § 2254(b) should not depend on the relief section of a prisoner's complaint.[5] Pet. Br. 19-23. As examples, we

---

[4]Balisok also contends that we have conceded the existence of a state created liberty interest in early release based on good-time credits. Res. Br. 1, n.1, 12, n.8. Balisok is incorrect. For purposes of our motion to dismiss, we assumed Balisok had a liberty interest in good-time credits. However, we do not concede this point. That question is disputed in *Wood v. Gotcher*, Supreme Court No. 95-1385, pending before this Court. Pet. Br. 5, n.2.

[5]Under *Preiser* and *Heck*, a prisoner would never be able to request good-time credits in the relief section of his civil rights complaint. *Heck*, 114 S. Ct. at 2369, citing *Preiser*, 411 U.S. at 488-

noted that Balisok temporarily dropped his request for good-time credits in order to avoid exhaustion, and that Gotcher unintentionally failed to request his good-time credits, thereby frustrating his ability to seek habeas relief. *Id.*

Rather than explain his strategic amendment or address the problems of a relief-based approach, Balisok argues that his original request for good-time credits "cannot be considered by the Court." Res. Br. 31. Although Balisok's original complaint has been superseded, it remains a relevant part of the course of these proceedings. In another part of his brief, Balisok expresses concern that exhaustion may preclude a federal court from reviewing a subsequent § 1983 claim. Res. Br. 26-27.[6] This concern underscores the likelihood that prisoners will attempt to circumvent exhaustion. *See* Pet. Br. 20-21, n.12.

The brief of the ACLU also confirms the need for a bright-line rule when it argues that Gotcher must now be allowed to seek damages for allegedly unlawful confinement because, having been released from prison, he can no longer seek habeas relief. ACLU Br. 19-23. The ACLU's concern with Gotcher's predicament is best addressed through application of the bright-line rule. The

---

90; *see also Dog Essence Saladin Amin v. Pruett*, ___ F. Supp. ___, 1996 WL 341522 at 3 (E.D. Va., June 12, 1996) ("even before *Heck*, it was unlikely that prisoners would ordinarily seek restoration of good-time credits in a § 1983 action, because it is clear under *Preiser* that they could not."). The bright-line rule recognizes that if a prisoner has affirmatively alleged all elements necessary to legally support a claim for a shorter duration of confinement, the claim is in "essence" an attack on the duration of confinement. There is no need to look to the subjective motivations of the inmate or to explore the theoretical question of whether success on the claim might not lead to a restoration of the lost good-time credits.

[6]This issue is addressed more fully *infra*, p.10 below.

bright-line rule would have prevented this strategic blunder and given Gotcher an opportunity to seek good-time credits before it was too late to do so. *See* Pet. Br. 22-23, n.14. Under the bright-line rule, a district court would have directed Gotcher to pursue habeas relief because his due process allegations stated a claim for restoration of good-time credits. Under the expedited procedures for habeas review, Gotcher had an opportunity to achieve release from the allegedly unlawful confinement.[7] The bright-line rule will ensure that prisoners like Gotcher will receive a federal forum and remedy before it is too late for the inmate, or the State, to correct the asserted error.

4. The Bright-Line Rule Is Based on Fed. R. Civ. P. 12(b)(6) and Easily Identifies the Nature of the Prisoner's Claim.

Federal Rule of Civil Procedure 12(b)(6) provides an appropriate and easily applied standard for determining whether a prisoner's claim should be categorized as an attack on his or her duration of confinement. Pet. Br. 24-26. Under the bright-line rule, a prisoner should be required to exhaust habeas corpus remedies if the allegations in the § 1983 complaint could support a claim for good-time credits under Fed. R. Civ. P. 12(b)(6), regardless of the relief requested. The standard is appropriate because it focuses on the nature of the claim itself, rather than on the relief specified in a prisoner's pleading. Pet. Br. 17-23.

Balisok and the ACLU argue that the bright-line

---

[7]Gotcher's cause of action appears to be barred under *Heck*, because he seeks damages for allegedly unconstitutional imprisonment. *Heck*, 114 S. Ct. at 2372. *Heck*'s bar to such an attack is not rendered inapplicable by the fortuity that Gotcher is no longer incarcerated. *Heck*, 114 S. Ct. at 2374 n.10. *See also* Res. Br. 28.

rule is impossible to apply because the words "could" and "would" have slightly different definitions. *See* Res. Br. 35; ACLU Br. 11 n. 6.[8]

The standard of Fed. R. Civ. P. 12(b)(6) is clear and has been consistently applied by district courts on a daily basis.[9] Under Fed. R. Civ. P. 12(b)(6), the courts "read the facts alleged in the complaint in the light most favorable" to the plaintiff to determine if any "relief could be granted". *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (citation omitted). An action should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Because Fed. R. Civ. P. 12(b)(6) is the standard, it makes no difference if the question is framed as whether the complaint "would" state a claim, or "could" state a claim. In applying this standard, federal courts have used "would" and "could" interchangeably. *Compare H.J. Inc.*, 492 U.S. at 249 (whether no relief "could" be granted) with *Haines v. Kerner*, 404 U.S. 519, 521 (1972); *Conley*, 355 U.S. at 45-46 (whether the plaintiff "would" be entitled to relief). The complaint will always state a claim whenever a plaintiff alleges the elements necessary to support a request for restoration of good-time credits.

Because the bright-line rule is premised on the well-defined standard of Fed. R. Civ. P. 12(b)(6), courts will have no difficulty determining whether the plaintiff's allegations, if successfully proven, support a claim for

---

[8]In making this semantic challenge to the bright-line rule, Balisok and the ACLU do not cite to Fed. R. Civ. P. 12(b)(6) or address its appropriateness for evaluating the nature of a prisoner's claim.

[9]The Prison Litigation Reform Act now requires district courts to apply this standard before the complaint is even served. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 805(a) (1996).

restoration of lost good-time credits. When restoration of good-time credits is a recognized remedy for the alleged violations, then the nature of the claim is in essence an attack on the plaintiff's duration of confinement. Such a claim should not be allowed to proceed under § 1983 merely because the plaintiff has momentarily omitted the request for relief from unlawful confinement that his own allegations support.[10]

The ACLU argues that the bright-line rule would require district courts to embark on a "speculative voyage" to determine whether a prisoner's allegations could support a claim for restoration of good-time credits "in some future state proceeding". ACLU Br. 11-12. The bright-line rule is based on the easily applied standard of Fed. R. Civ. P. 12(b)(6), which focuses on the allegations set forth in the present complaint, not in some future proceeding. A district court is not required to speculate about the outcome of future proceedings, or the application of state law, *res judicata*, or defenses like harmless error. The bright-line rule is easily applied to any prisoner complaint and asks whether the prisoner's allegations state a claim for relief from unlawful confinement.

In addition to its ease of application, the bright-line rule may also further judicial economy. By refusing to allow prisoners to split a § 1983 claim into two, the bright-line rule eliminates the need to convene two separate juries to address the related claims of damages resulting from the disciplinary procedures, and damages resulting from the disciplinary sanction. The district court will be able to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

---

[10]The federal courts are already required to look beyond the relief set forth in the complaint. Pet. Br. 24, citing Fed. R. Civ. P. 54(d); *Conley*, 355 U.S. at 45-46. (the question is whether the plaintiff is entitled to any relief under the allegations).

5. The Bright-Line Rule Does Not Impede Federal Review of Constitutional Violations Under § 1983.

Balisok and the ACLU argue that the bright-line rule should be rejected because it may impede federal review of constitutional violations under § 1983. Res. Br. 36-40, 46-48. Balisok suggests that the rule will bar relief for prisoners who run "the risk of being brutally beaten", and who are subject to "dehumanizing treatment", "senseless suffering", or "wretched misery". Res. Br. 46-47 (citations omitted). ACLU Br. 17-18. This argument misconstrues the bright-line rule. The bright-line rule requires prisoners to exhaust habeas corpus remedies if their allegations state a claim for relief from unlawful confinement. By its terms, the bright-line rule does not apply to allegations of prison brutality or inhumane conditions, which do not implicate the fact or duration of confinement.

Balisok also argues that exhaustion will bar federal review of his procedural due process claim because a federal court must accord preclusive effect to issues decided by the state courts during his exhaustion of state habeas remedies. Res. Br. 36-38. Preclusion of a § 1983 claim does not result from exhaustion, but from Congress' enactment of 28 U.S.C. § 1738, which requires the federal courts to give the same full faith and credit to state court judgments as is afforded within the state itself. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

The possibility that federal review under § 1983 may be limited does not justify any exception to the statutory requirements of state court exhaustion and full faith and credit to state court judgments. Because Balisok's claim is properly classified as an attack on his loss of good-time credits, Balisok must exhaust state remedies, subject to the same statutory provisions as any other litigant.

6. The Bright-line Rule is Consistent With *Heck* Because it Addresses a Question Not Resolved by *Heck*'s Tort Analysis.

Balisok and the ACLU argue that the bright-line rule is foreclosed by *Heck*. Balisok reads *Heck*'s tort law analysis beyond its context. Because the prisoner in *Heck* sought relief premised on unlawful confinement itself, tort law provided an obvious and easy answer -- damages claims must not be used to challenge the validity of an outstanding basis for confinement. *Heck*, 114 S. Ct. at 2371-72. Balisok assumes that under *Heck*, exhaustion is not required for any claim that does not necessarily invalidate the basis of confinement. Res. Br. 11-16; ACLU Br. 6-12.

Balisok is wrong because *Heck* left open the question of whether a prisoner may bypass exhaustion under § 2254(b) by limiting his request for relief to damages that are not premised on unlawful confinement. In *Heck*, this Court specifically refused to address this different question. Much like Balisok, Heck tried to argue that the relief he sought did not include damages premised on unlawful confinement; Heck argued that success on "his damages claims would not invalidate his conviction." *Heck*, 114 S. Ct. at 2368-69 n. 2. This Court refused to address this argument because Heck had not raised it until his reply brief. *Id.* This Court also refused to answer a question raised by Humphrey: whether "exhaustion of state remedies should be required . . . whenever 'judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid.'" *Heck*, 114 S. Ct. at 2373 (citation omitted).

Thus, *Heck* expressly refused to decide the result

for claims that relate to the prisoner's confinement, but do not necessarily invalidate that confinement.[11] The question before the Court in *Heck* was "whether money damages premised on an unlawful conviction could be pursued under § 1983." *Heck*, 114 S. Ct. at 2368-69 n. 2. This Court's holding was confined to claims for "damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid". *Heck*, 114 S. Ct. at 2372. This Court did not abandon the statutory and comity-based analysis that must be relied upon for claims that fall within the intersection of § 2254(b) and § 1983. As discussed above, the bright-line rule provides the appropriate way to address those claims. *Supra*, p. 2-10.

A prisoner who narrows his claim by only requesting relief from procedural violations will not be subject to the tort analysis of *Heck* unless his claim would necessarily invalidate the resulting loss of good-time credits. The bright-line rule provides an appropriate way to assess claims that might invalidate a resulting loss of good-time credits. The bright-line rule is consistent with *Preiser* and *Heck*, and properly focuses on the nature of the plaintiff's claim itself. Regardless of the relief actually sought by a prisoner, the underlying claim is the proper focal point for evaluating the implication of a lawsuit to the prisoner's duration of confinement.

---

[11]That issue is presented in this case. Balisok argues that his due process claim will not necessarily invalidate his loss of good-time credits. Res. Br. 11-16. If Balisok is correct, and we contend he is not (*see infra*, p. 13-14), his § 1983 claim should be dismissed under the bright-line rule and Balisok should be directed to pursue his habeas corpus remedy.

C. *Heck* Bars Balisok's § 1983 Claim.

Heck provides a second and independent reason why Balisok cannot proceed with his § 1983 action. In *Heck* this Court applied principles of tort law to bar a prisoner's § 1983 action for damages for unlawful confinement because the § 1983 claim would necessarily imply the invalidity of his conviction. The § 1983 cause of action would not accrue unless the prisoner successfully challenged his conviction in a habeas corpus action.

Balisok agrees that *Heck* applies to cases involving the loss of good-time credits, but argues that the rule in *Heck* does not bar his § 1983 claim. This argument is based on Balisok's contention that his due process claim would not necessarily imply the invalidity of his loss of good-time. Res. Br. 11-16, 21-25. This contention is wrong.

In his complaint, Balisok alleges that prison officials intentionally violated the due process requirements of *Wolff*. Under *Wolff* "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense". 418 U.S. at 566. Balisok's due process claim is that the prison officials' practice is to deprive jail house lawyers of the ability to present witness statements. Res. Br. 11, Pet. App. I-4 to I-6. This is not a mere procedural technicality, but a clear and serious claim that prison officials violated *Wolff*'s minimum due process protections.

The only reason offered by Balisok that such a serious violation would not invalidate his loss of good-time credits is his interpretation of the "some or any evidence" standard of review in prison disciplinary proceedings. According to Balisok, due process violations will not invalidate the loss of good-time credits if there is some evidence to support the conclusion reached by the prison officials. Res. Br. 21-25. This argument is not well taken

for two reasons.

First, Balisok misinterprets the some evidence rule. This rule only governs the evidentiary requirement of due process. *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 455-56 (1985); *In re Johnston* 109 Wn.2d 493, 497, 745 P.2d 864 (1987) ("[t]he evidentiary requirements of due process are satisfied if there is 'some evidence' in the record to support a prison disciplinary decision revoking good time credits."); *In re Burton*, 80 Wn. App. 573, 910 P.2d ___, *review denied*, ___ Wn.2d ___ (1996). The some evidence standard does not apply to the *Wolff* requirement that prisoner's have the right to present witnesses.

Second, Balisok's argument about the some evidence standard cannot be correct because it would render *Wolff*'s due process requirements meaningless. *Wolff* requires that a prisoner (1) receive notice of the alleged violation; (2) have the opportunity to present witnesses and documentary evidence when not unduly hazardous to institutional safety and correctional goals, and (3) receive a written statement of evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563-66. According to Balisok, prison officials could violate all three of these due process requirements and a loss of good-time credits would always be sustained if there was some evidence of violations. It would be illogical if violations of *Wolff*'s due process requirements, which are specifically designed to prevent arbitrary deprivation of good-time credits, would never justify restoration of the good-time credits arbitrarily taken.

Balisok's § 1983 claim is barred by *Heck* because it necessarily implies the invalidity of his loss of good-time credits.

D. Dismissal of Balisok's § 1983 Claim is Consistent With *Wolff*.

We have set forth two independent bases why Balisok's § 1983 claim should be dismissed. Both are consistent with this Court's decision in *Wolff*, where a class action challenge to established prison disciplinary procedures was allowed to proceed.[12]

Balisok relies heavily on dicta in *Heck* where the Court suggested, without deciding, that the "passage [in *Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result." *Heck*, 114 S. Ct. at 2370; Res. Br. 14. However, *Heck* qualified this statement by observing that "the claim at issue in *Wolff* did *not* call into question the lawfulness of the Plaintiff's continuing confinement." *Heck*, 114 S. Ct. at 2370. As we have shown in this case, the serious procedural violations alleged by Balisok do call into question the lawfulness of his confinement.[13] *See supra*, p. 13-14.

We have also explained why *Wolff* is distinguishable as a class action challenge to established and undisputed

---

[12]Balisok and the ACLU also argue that *Heck* has been uniformly and consistently applied to allow claims that seek only relief from procedures. Res. Br. 34-36, ACLU Br. 9-10. We established that this contention is not true in our petition and its reply. Pet. 12-21; Pet. Reply 1-6. Even authority cited by Balisok refutes this claim. Balisok cites *Dog Essence Saladin Amin v. Pruett*, ___ F. Supp. ___, 1996 WL 341522 (E.D. Va. June 12, 1996); Res. Br 35, n.22. In *Dog Essence* the district court applied *Heck* to dismiss a claim that a prison disciplinary proceeding violated due process. The court also noted that the circuits have failed to apply *Heck* uniformly.

[13]Moreover, if *Wolff* had resolved the question presented in this case, the Court would not have reserved it in footnote 2 of *Heck*, when it refused to address Heck's argument that he was only seeking damages for harm other than that stemming from his conviction.

state procedures. Pet. Br. 32-34. Unlike the broad-based challenge addressed in *Wolff*, Balisok's challenge is to alleged procedures of his own disciplinary proceeding.

Balisok argues that the existence of class certification is not relevant to the question of exhaustion because a court will apply the same test to decide whether the litigants will be entitled to prospective relief. Res. Br. 17 n. 11. Similarly, the ACLU argues that class certification is an irrelevant distinction because the number of prisoners in a case does not change the nature of the relief sought. ACLU Br. 24 n. 20.

Both Balisok and the ACLU miss the point of the class action distinction. Class certification is relevant because it does alter the nature of the claims that will be reviewed by the court. Through the process of class certification, a federal court can make a principled decision as to whether there may be a legitimate need for institution-wide relief from established state procedures. If there is, then the litigation will not merely involve the claims of individuals who have suffered a loss of liberty. The class will also include prisoners who have not yet lost good-time credits, are not attacking their duration of confinement, and whose claims are cognizable under § 1983.

Although some class members may have lost good-time credits, exhaustion is largely futile if identical claims are already being litigated on behalf of class members whose confinement is not called into question. In such a case, the court has the discretion to decide whether a class action is "superior to other available methods for the fair and efficient adjudication" of the procedural claims. Fed. R. Civ. P. 23(b)(3); *see Leonard v. Mississippi State Probation & Parole Bd.*, 509 F.2d 820, 823-24 (5th Cir.), *cert. denied*, 423 U.S. 998 (1975); *Project Release v. Prevost*, 463 F. Supp. 1033, 1039 (E.D.N.Y. 1978) (because habeas corpus was not available to those class members who may be confined in the future, suit under §

1983 was found proper); *Tucker v. Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 501 (M.D. Ala. 1976) ("Even if Tucker's suit is viewed as more in the nature of a habeas corpus claim, his status as class representative permits him to proceed under § 1983 on behalf of the class.").

II. CONCLUSION

For the foregoing reasons and those stated in the opening brief, the prison officials respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be reversed, and that Balisok be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

Kathleen D. Mix*
Talis Merle Abolins
William Berggren Collins
Mary E. Fairhurst
Daniel J. Judge
Assistant Attorneys General
Counsel of Record*
Counsel for Petitioners

PO Box 40116
Olympia, Washington 98504-0116
(360)586-1445

September 1996

Supreme Court, U.S.
FILED
JUN 28 1996
CLERK

No. 95-1352

In The

Supreme Court of the United States

October Term, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF BY CALIFORNIA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, AND VIRGINIA, AS AMICI CURIAE SUPPORTING THE PETITIONERS

DANIEL E. LUNGREN
Attorney General of the
State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS*
Senior Assistant Attorney General

50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6051

Attorneys for Amici States

*Counsel of Record

[Additional States Listed On Inside Cover]

35 pp

ALASKA

BRUCE M. BOTELHO
Attorney General
State of Alaska
Office of the
Attorney General
123 4th Street, 6th Floor
Juneau, AK 99801
Phone: 907/465-3600

ARIZONA

GRANT WOODS
Attorney General
State of Arizona
Office of the
Attorney General
1275 West Washington
Street
Phoenix, AZ 85007
Phone: 602/542-4266

COLORADO

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman St.,
5th Floor
Denver, CO 80203
Phone: 303/866-3052

CONNECTICUT

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
Office of the
Attorney General
55 Elm Street
Hartford, CT 06106
Phone: 203/566-2026

DISTRICT OF COLUMBIA
Charles F.C. Ruff
Corporation Counsel, D.C.
One Judiciary Square
441 4th Street, N.W.
Washington, DC 20001
Phone: 202/727-6248

FLORIDA

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
Office of the
Attorney General
The Capitol
PL 01
Tallahassee, FL 32399-1050
Phone: 904/487-1963

KANSAS

CARLA J. STOVALL
Attorney General
State of Kansas
Office of the
Attorney General
Judicial Building
301 West Tenth Street
Topeka, KS 66612-1597
Phone: 913/296-2215

MISSISSIPPI

MIKE MOORE
Attorney General
State of Mississippi
Office of the
Attorney General
Department of Justice
Post Office Box 220
Jackson, MS 39205-0220
Phone: 601/359-3692

MONTANA

JOE MAZUREK
Attorney General
State of Montana
Office of the
Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406/444-2026

NEBRASKA

DON STENBERG
Attorney General
State of Nebraska
Office of the
Attorney General
2115 State Capitol
Lincoln, NE 68509
Phone: 402/471-2682

NEVADA

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
Office of the
Attorney General
Capitol Complex
Carson City, NV 89710
Phone: 702/687-4170

NEW YORK

DENNIS C. VACCO
Attorney General
State of New York
Department of Law
The Capitol
Albany, NY 12224
Phone: 518/474-8101

OKLAHOMA

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Blvd.,
Ste. 112
Oklahoma, OK 73105-4894
Phone: 405/521-3921

PENNSYLVANIA

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of
Pennsylvania
Office of the
Attorney General
16th Floor,
Strawberry Square
Harrisburg, PA 17120
Phone: 717/787-3391

SOUTH CAROLINA

CHARLES MOLONY CONDON
Attorney General
State of South Carolina
Office of the
Attorney General
Rembert C. Dennis
Office Bldg.
Post Office Box 11549
Columbia, SC 29211-1549
Phone: 803/734-3970

VIRGINIA

JAMES S. GILMORE, III
Attorney General of the
Commonwealth of
Virginia
Office of the
Attorney General
900 E. Main Street
Richmond, VA 23219
Phone: 804/786-5630

WISCONSIN

JAMES E. DOYLE
Attorney General
State of Wisconsin
Office of the
Attorney General
114 E. State Capitol
Madison, WI 53701-7857
Phone: 608/266-1221

QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time.

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE STATES HAVE REMEDIAL SCHEMES THAT CAPABLY ADDRESS CLAIMS OF ERROR IN PRISON ADMINISTRATIVE HEARINGS.	5
II. FEDERAL HABEAS CORPUS IS THE PROPER REMEDY TO CORRECT PROCEDURAL OR SUBSTANTIVE DUE PROCESS ERRORS IN PRISON ADMINISTRATIVE HEARINGS.	13
III. A HOLDING THAT PRISON ADMINISTRATIVE PROCEEDINGS MUST BE FOUND INVALID BEFORE A PRISONERS' PROCEDURAL OR SUBSTANTIVE DUE PROCESS CLAIM FOR DAMAGES ACCRUES UNDER THE CIVIL RIGHTS ACT STRIKES A PROPER BALANCE BETWEEN THE RIGHTS OF THE STATES AND THE RIGHTS OF AGGRIEVED PRISONERS.	20
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
Cases	
Abraska v. Alaska Dept. of Corrections 902 P.2d 319 (Alaska 1995)	7
Allen v. McCurry 449 U.S. 90 (1980)	5, 18
Arizona v. Melendez 172 Ariz. 68 834 P.2d 154 (1992)	6
Bell v. Wolfish 441 U.S. 520 (1979)	13
Bourgeois v. Murphy 119 Idaho 611 (1991)	6
Carey v. Piphus 435 U.S. 247 (1978)	13, 15, 17
Clark v. Maine Dept. of Corrections 463 A.2d 762 (Maine 1983)	6
Cleavenger v. Saxner 474 U.S. 193 (1986)	15
Department of Corrections v. Marshall 618 So.2d 777 (Fla. 1993)	7
Duckworth v. Serrano 454 U.S. 1 (1981)	5

TABLE OF AUTHORITIES, CONT'D

Dumas v. State
654 So.2d 48 (Ala. 1994) 7

Greene v. Sec. of Public Safety and Correctional Services
68 Md.App. 147
520 A.2d 613 (1985) 6

Hawaii v. Alvey
67 Haw. 49
678 P.2d 5 (1984) 6

Heck v. Humphrey
512 U.S. ___
114 S.Ct. 2364 (1994) 1, 15, 16

Hrbek v. State
478 N.W.2d 617 (Iowa 1991) 7

Huffman v. Pursue Ltd.
420 U.S. 592
reh'g denied, 421 U.S. 971 (1975) 5

In re Lamb
296 N.E.2d 280 (Ohio 1973) 6

In re Spence
36 Cal.App.3d 636 (1974) 6

In re Wilson
202 Cal.App.3d 661 (1988) 6

TABLE OF AUTHORITIES, CONT'D

Kelly v. Nix
329 N.W.2d 287 (Iowa, 1983) 6

LaFaso v. Patrissi
161 Vt. 46
633 A.2d 695 (1993) 6

Lewis v. Casey
___ U.S. ___ (1996)
U.S. LEXIS 4220 (1996) 17

Manos v. Harter
104 Ohio App.3d 430
662 N.E.2d 386 (1995) 7

Martin v. Hunter's Lessee
1 Wheat. 304 (1816) 5

McGinnis v. Stevens
543 P.2d 1221 (Alaska 1975) 6

Melvin v. Pence
130 F.2d 423 (D.C. Cir. 1942) 16

Olim v. Wakinekona
461 U.S. 238 (1983) 17

Patsy v. Board of Regents of State of Florida
457 U.S. 496 (1982) 11, 12

People ex rel. Vega v. Smith
66 N.Y.2d 130 (1985.) 6

TABLE OF AUTHORITIES, CONT'D

People v. Superior Court
230 Cal.App.3d 1592
281 Cal.Rptr. 900 (1991) 7

Preiser v. Rodriguez
411 U.S. 475 (1973) 1, 5, 14, 15

Prock v. District Court of Pittsburg Co.
630 P.2d 772 (Okl. 1981) 6

Raditch v. U.S.
929 F.2d 478 (9th Cir. 1991) 16

Rosario v. Selsky
169 A.D.2d 955
564 N.Y.S.2d 851 (App. Div. 1991) 7

Sanchez v. Hunt
329 So.2d 691 (1976) 6

Sandin v. Conner
___ U.S. ___
115 S.Ct. 2293 (1995) 14

Silverton v. Dept. of the Treasury
644 F.2d 1341 (9th Cir. 1981) 18

Stone v. Powell
428 U.S. 465 (1976) 5

Superintendent v. Hill
472 U.S. 445 (1985) 6

TABLE OF AUTHORITIES, CONT'D

Weiss v. Coughlin
199 A.D.2d 638
604 N.Y.S.2d 654 (App. Div. 1993) 7

Wolff v. McDonnell
418 U.S. 539 (1979) 15, 18

Young v. Kenny
907 F.2d 874 (9th Cir. 1990) 18

Young v. Selsky
41 F.3d 47 (2d Cir. 1994)
(Van Graffeiland dissenting)
cert. denied, ___ U.S. ___
115 S.Ct. 1837 (1995) 20

Constitutional Provisions

United States Constitution
Article VI 5

Statutes

28 U.S.C.
§ 2254 4, 18

42 U.S.C.
§ 1983 1, 4, 10, 11, 13-17, 19, 22
§ 1997e 11
§ 1997e(a) 11

TABLE OF AUTHORITIES, CONT'D

Court Rules

Supreme Court
Rule 37.5 1

Other Authorities

141 Cong. Rec. S5150
(daily ed. April 4, 1995)
(Statement of Sen. Hatch) 12

141 Cong. Rec. S7526
(May 25, 1995)
(Statement of Sen. Dole) 12

141 Cong. Rec. S14611
(Sept. 25, 1995)
(Statement of Sen. Dole) 12

Civil Rights of Institutionalized
Persons Act (CRIPA) 11

H.R. Rep. No. 21, 104th Cong. 1st Sess.
at 13 (1995) 12

Hotvet
State Court Precedent with
Respect to Prison
Disciplinary Determinations
(8th Ed. 1995) 7

TABLE OF AUTHORITIES, CONT'D

Prosser and Keeton
Torts 5th Ed., § 120
pgs. 891-893 (1985) 15

R. Hanson & H. Daley
Challenging the Conditions of
Prisons and Jails, A Report on
Section 1983 Litigation, at 19
(1995) 11, 21

Schwartz
The Preiser Puzzle:
Continued Frustrating
Conflict Between the Civil
Rights and Habeas Corpus
Remedies for State Prisoners,
37 De Paul L.Rev. 85, 98
(1988) 12, 13

INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Supreme Court Rule 37.5, on behalf of the State of California and the other signature states ("the Amici States") through their attorneys general, in support of the Petitioners who are prison officials of the Washington State Department of Corrections. The Amici States have an important interest in this case because they all operate correctional facilities, and must safely maintain discipline and order among their prison populations.

The fundamental rights at issue in this case are federalism and comity. The states have a paramount interest in addressing and correcting errors of constitutional significance in prison administration. "It is difficult to imagine an activity in which the state has a stronger interest, or one that is more intricately bound up with state laws, than the administration of its prisons. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the states the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

In *Preiser*, this Court held that habeas corpus is the exclusive remedy for a prisoner challenging the fact or duration of his confinement, or immediate or speedier release from custody, even though the claim could literally fall within the terms of § 1983. *Preiser v. Rodriguez*, 411 U.S. at 488-490. By its terms, *Preiser* requires prisoners seeking the restoration of sentence reduction credits lost in prison disciplinary actions to proceed by way of habeas with the attendant exhaustion of state remedies. *Preiser*, 411 U.S. at 500.

Heck v. Humphrey, 512 U.S. ___, 114 S.Ct. 2364 (1994), holds that even though a prisoner seeks damages,

a cause of action under § 1983 does not arise until the prisoner has demonstrated the invalidity of his confinement in some other proceeding. The question that remains unanswered after *Preiser* and *Heck*, and the one Amici seek the Court to answer in this case, is whether it is the nature of a prisoner's claim or the relief a prisoner seeks that determines whether the claim is one for habeas corpus or instead is cognizable in an action pursuant to § 1983.

The Amici seek a ruling from this court that the nature of a prisoner's claim, not the relief he seeks, determines whether a claim is for habeas corpus or cognizable in an action under § 1983, and that procedural or substantive due process challenges to prison administrative proceedings are cognizable in federal habeas corpus. Only after administrative action taken against a state prisoner terminates in a prisoner's favor, does a damages claim for a procedural or substantive due process violation accrue under § 1983.

SUMMARY OF ARGUMENT

The remedial schemes provided by the states for prisoners to redress claims of error in the prison administrative hearing process provide a meaningful forum for constitutional claims. All the states have functional prison administrative grievance procedures. State courts are capable of enforcing the Constitution, and impose procedures in prison disciplinary cases that exceed those required by the Due Process Clause.

Civil rights actions and writs of habeas corpus are not fungible remedies, and habeas corpus is the preferred remedy to redress a due process claim. When a prisoner contests prison administrative action on due process grounds, the primary objective of the litigation should be to correct error in the process or the result. In such circumstances an award of damages to the prisoner is a secondary consideration. The nature of the claim asserted, not the relief sought by a prisoner, determines whether the claim is one for a civil rights violation, or instead is cognizable in habeas corpus. Claims of procedural or substantive due process violations are particularly suitable for resolution by courts in habeas corpus proceedings.

A holding that a prison administrative determination must be found invalid in some proceeding before a damages claim based upon procedural or substantive due process accrues to a prisoner, strikes a proper balance between the states' concerns for comity and federalism and prisoners' rights to seek compensation for injury. There will be no resulting injustice when prisoners are required to prove error in an administrative appeal, state judicial proceeding or federal habeas corpus before suing for damages. The remedy provided in state administrative review, the state courts or federal habeas corpus proceedings is just as

valuable as a declaratory judgment in a civil rights action or an award of nominal damages. When an adequate remedy exists under 28 U.S.C. § 2254, there is no need for prisoners to pursue immediate civil rights relief under § 1983.

A rule that a procedural or substantive due process claim does not accrue under the civil rights act until a proceeding has terminated in favor of a prisoner will afford the states a fair and reasonable opportunity to correct errors in administrative hearings in state prisons, promote the orderly administration of justice, conserve judicial resources and ensure a meaningful remedy to aggrieved prisoners.

ARGUMENT

I.

THE STATES HAVE REMEDIAL SCHEMES THAT CAPABLY ADDRESS CLAIMS OF ERROR IN PRISON ADMINISTRATIVE HEARINGS.

Article VI of the United States Constitution declares that the constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This Court has regularly observed, since the earliest days of our republic, that state courts have the ability, integrity and responsibility to safeguard individual liberties and uphold federal law. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-347 (1816). See also, *Duckworth v. Serrano*, 454 U.S. 1, 3-4 (1981); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976); *Huffman v. Pursue Ltd.*, 420 U.S. 592, 611, *reh'g denied*, 421 U.S. 971 (1975).

At times, the federal courts have been described as more sensitive and understanding of federal rights than state courts. *Preiser v. Rodriguez*, 411 U.S. at 514 (Brennan, J., dissenting). However, the states provide extensive remedial schemes for aggrieved prisoners, and state decisional law often prescribes rights to prisoners that exceed those required by the constitution.

In oversight of prison disciplinary proceedings, State courts protect constitutional rights, and on occasion have imposed requirements on prison officials that exceed the measures required by the constitution. For example, California and Louisiana courts reviewed prison disciplinary cases for evidence of guilt before this court

handed down the "some evidence" rule of *Superintendent v. Hill*, 472 U.S. 445 (1985). See, *In re Spence*, 36 Cal.App.3d 636 (1974); *Sanchez v. Hunt*, 329 So.2d 691 (1976). Alaska courts require that prison disciplinary hearings be tape recorded. *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975). In Arizona a prisoner's due process rights are violated if his representative in a disciplinary hearing is questioned about the case without prior notice. *Arizona v. Melendez*, 172 Ariz. 68, 834 P.2d 154 (1992). Inmates have a right to be assisted by counsel in disciplinary proceedings in Hawaii. *Hawaii v. Alvey*, 67 Haw. 49, 678 P.2d 5 (1984). Idaho requires that prison officials demonstrate the chain of custody for physical evidence relied upon in disciplinary hearings. *Bourgeois v. Murphy*, 119 Idaho 611 (1991). Iowa inmates must be provided a written statement of reasons why their requested witnesses will not be called in a disciplinary hearing. *Kelly v. Nix*, 329 N.W.2d 287 (Iowa, 1983). In New York, prison disciplinary decisions will be upheld if there is "substantial evidence" of guilt. *People ex rel. Vega v. Smith*, 66 N.Y.2d 130 (1985.)[1/]

---

1. Other decisions of state courts affording inmates greater protection than constitutionally required are, *Clark v. Maine Dept. of Corrections*, 463 A.2d 762 (Maine 1983) (inmates may have prison administrative determinations reviewed by state courts whether or not a constitutionally protected interest is at stake); *Greene v. Sec. of Public Safety and Correctional Services*, 68 Md.App. 147, 520 A.2d 613 (1985) (prison administrative grievance determinations reviewed under a substantial evidence test); *In re Wilson*, 202 Cal.App.3d 661 (1988) (prison classification designation reviewed); *In re Lamb*, 296 N.E.2d 280 (Ohio 1973) (evidentiary hearing required before prisoner can be placed in segregation); *Prock v. District Court of Pittsburg Co.*, 630 P.2d 772 (Okl. 1981) (inmates in segregation pending disciplinary determinations are entitled to weekly review of a pending investigation); *LaFaso v. Patrissi*, 161 Vt. 46, 633 A.2d 695 (1993) (prison officials conducting disciplinary hearings are required to apply a preponderance of the evidence standard to determine guilt). An exhaustive discussion of the diligence of the New York state courts review of prison disciplinary decisions can be found in Hotvet, State Court Precedent with Respect to Prison Disciplinary Determinations (8th Ed. 1995).

There is also abundant authority that shows the States protect the constitutional measure of process to be afforded prisoners in disciplinary hearings. *See, e.g., People v. Superior Court*, 230 Cal.App.3d 1592, 1595, 281 Cal.Rptr. 900, 902 (1991); (court directed prison officials to re-conduct a prison disciplinary hearing based upon the inmate's "right to be heard by an impartial disciplinary committee); *Manos v. Harter*, 104 Ohio App.3d 430, 432, 662 N.E.2d 386, 388 (1995) (the prison disciplinary committee may not consist of persons who investigated the case against the inmate or those who have pre-existing biases or opinions that would prevent them from deciding the case in an impartial manner); *Weiss v. Coughlin*, 199 A.D.2d 638, 639, 604 N.Y.S.2d 654, 655-56 (App. Div. 1993) (the failure to allow inmate to be present at disciplinary hearing and to call witnesses violated the inmate's due process rights); *see*, *Rosario v. Selsky*, 169 A.D.2d 955, 564 N.Y.S.2d 851 (App. Div. 1991) (denial of due process not to advise the prisoner that informant identified him from photo line-up because line-up could have been used by the prisoner in his defense).[2/]

---

2. *See also Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991); *Department of Corrections v. Marshall*, 618 So.2d 777 (Fla. 1993) ("failure to offer a valid reason for not calling witness gave the trial court sufficient cause to grant petition for writ of mandamus"); *Dumas v. State*, 654 So.2d 48, 49 (Ala. 1994) (reversal of prison disciplinary hearing where inmate was not afforded a qualified right to call witnesses); *Abraska v. Alaska Dept. of Corrections*, 902 P.2d 319, 321 (Alaska 1995) (refusal to allow inmate to call other inmates to testify and to have accusing staff member questioned at the hearing violated the inmate's due process rights).

All the states have administrative schemes that allow prisoners to challenge prison practices or policies.[3] These procedures typically provide the right

3. The States' regulations affording administrative appeals procedures to state prisoners are reported at: Ala. Dep't of Corrections, Admin. Reg. § 403 (1992); Alaska Dep't of Corrections, 22 AAC § 05.480 (1987); Ariz. Dep't of Corrections, IMP 103.31 (1994); Ark. Dep't of Corrections, Admin. Reg. § 831 (1990); Cal. Code Regs. Tit. 15 §§ 3084, *et seq.* and 3315(g) (1993); Colo. Dep't of Corrections, Code of Penal Discipline, § 203-1 (1984); Conn. Dep't of Correction, Admin. Directive No. 9.5 (1994); Del. Bureau of Prisons, Proc. Man., CH. 4 (1992); Fla. Dep't of Corrections Rules, Ch. 33-22 (1986), as amended, Ch. 33-29 (1992); Ga. Dep't of Corrections, Standard Operating Procedures, IIB02-0001 (1992); Haw. Admin. Reg. § 17-201-20 (1983); Idaho Dep't of Corrections, Policy & Proc. Man. § 318-C (1987); Ill. Dep't of Corrections, Tit. 20, Ch. 1: Subch. e, Rule 504F (1988); Ind. Dep't of Corrections, Admin. Proc. Man. of Policies & Proc., 02-04-101 (1994); Iowa Div. of Institutions, Dep't Policy & Proc. IN-V-36 (1984; Kan. Admin. Reg. Art. 44-13-701-44-13-707 (1992); Ky. Corrections Policies & Proc. § 15.6 (1992); La. Dep't of Public Safety & Corrections, Disciplinary Rules and Proc. for Adult Inmates (1st Ed. 1993)(Approved La. R.S. 15:1171 *et seq.*; Me. Dep't of Corrections, Client Disciplinary Procedures, CH. 15.1 (1994); Md. Div. of Corrections Reg., DCR No. 105-2 (1988); 103 Com. Mass. Reg. 430.00, 430.18, 430.19 & 430.22 (1992); Mich. Dep't of Corrections, Policy Directive, 03.03.105 (1994); Minn. Dep't of Corrections, Policy & Proc. - Discipline Plan (1988), and Inmate Discipline Reg. (1993); Miss. Dep't of Corrections, Administrative Remedy Program (1994); Mo. Dep't of Corrections and Human Resources, Institutional Services Policy and Proc. Man., IS8-2.1 (1992), IS19-1.3 and IS19-1.4 (1994); Mont. Dep't of Corrections, Policy Statement, Inmate Grievance Procedure MSP 14-003 (Jan. 1993); Neb. Dep't of Correctional Services, Title 68, Ch. 6 (1994), Nev. Dep't of Prisons, Code of Penal Discipline (1993); N.H. Dep't of Corrections Policy and Proc. Directive, Enforcement OP. Statement No. 1.5.25 (1993); N.J. Admin. Code Tit. 10A, Subch. 11 (1994); N.M. Corrections Department, Inmate Discipline Reg. CD-090301 (1991), and Inmate Discipline for Minimum and Minimum Restrict Custody Facilities, CD-0-0101 (1992); N.Y. Comp. Code R. & Regs. Tit. 7 §§ 253.8, 254.8 (1983); N.C. Div. of Prisons, Policies & Proc. §§ .0200.0204

to administratively challenge any policy or procedure adversely affecting conditions of confinement, allow for automatic administrative review, and mandate periods within which appeals must be decided. With the exception of six States (Indiana, Maryland, Michigan, Oklahoma, Utah, and West Virginia), all States provided directives requiring a response to inmate administrative appeals within 60 days.[4] Fourteen states also have provisions that suspend, during the administrative appeal process, any penalties or sanctions that are imposed on an inmate.[5]

(1994); N.D. Dep't of Corrections & Rehabilitation Policies & Proc. Man. (Inmate Rules and Discipline) (1994); Ohio Dep't of Rehabilitation and Correction, Inmate Disciplinary Manual, OAC Rule 5120-9-09 (K)-(M) (1993); Okla. Dep't of Corrections, Policy & Operations Manual: Classification and Case Management Disciplinary Procedures OP-060125 (1993); Or Admin. R. 291-105-073 (1993); Pa. Dep't of Corrections, Inmate Disciplinary & Restricted Housing Procedures, DC-ADM 801 (1992); R.I. (by order in *Morris v. Travisono*, 499 F. Supp. 149 (1980)); S.C. Dep't of Corrections, Inmate Disciplinary Hearings § 1500.24 (15/24) (1994); S.D. State Penitentiary, R & Discipline 3C.3 (Prop. Draft); Tenn. Dep't of Corrections, Admin. Policies & Proc. § 502.01 (1993); Tex. Institutional Div., Disciplinary Rules and Procedures for Inmates (1993); Utah Dep't of Corrections, Disciplinary Due Process Proc. FDR 01/05.00 (1994); VT. Dep't of Corrections, Inmate Disc. (1021), Policy # 410 (1991); Va. Dep't of Corrections, Div. of Adult Institutions Operating Proc. 861 (1992); Was. Div. of Prisons, Div. Directive, DOP 461 (1991); W.V. Dep't of Corrections, Policy Directive § 670.00 (1991); Wis. Div. of Adult Institutions Rules of Department of Corrections 303.75, 303.76 (1990); Wyo. Dep't of Corrections, Code of Inmate Discipline (1994).

4. In Alabama, the entire process cannot exceed 60 days, while Wisconsin does not provide a deadline for minor offenses, and Indiana merely requires a response "in a timely manner." Many States provide for review in periods shorter than 60 days.

5. Three States (Alaska, Delaware, and Maine) stay all punishment until the administrative appeal process is completed;

Statistics pertaining to administrative remedies, as reported by the States, indicate that between seven and twenty one percent of administrative appeals pursued to the highest levels of review result in modification or reversal of the charge.[5] A recent study of section 1983 litigation filed by prisoners indicates that 94% of all prisoner cases are dismissed by courts on their own motion, or the motion of a defendant; 4% of the cases are dismissed by stipulation; and 2% result in a verdict. R. Hanson & H. Daley, Challenging the Conditions of Prisons and Jails, A Report on Section

---

one state (Iowa) suspends punishment through appeal to the prison warden; five States (Minnesota, New Jersey, Rhode Island, Tennessee, and Washington) require approval to suspend sanctions; three States (Kansas, Massachusetts (isolation only), and North Dakota (loss of good time only) suspend certain sanctions pending appeal.

6. Statistics compiled by California's Department of Corrections for the period July 1, 1994 through June 30, 1995, indicate 50% of the appeals received were granted or partially granted at the lowest level of review, 29% were granted or partially granted at the intermediate level of review, and 7% were granted or partially granted at the final level of review. California Department of Corrections, Inmate Appeal Activity, Annual Report, Fiscal Year 94/95. Other states provided the following information pertaining to their state administrative processes: In Oklahoma, from May 1995 through May 1996, 17% of the inmate disciplinary hearings challenged by administrative appeal were reversed or remanded for rehearing. Prisoners were successful in 15% of the appeals filed in New Hampshire in 1995 and 1996. New Mexico reports 13% of the inmate classification appeals filed in 1995, and 9% of those filed in 1996 were successful. In New York, 1995 statistics for the Special Housing/Inmate Disciplinary Program indicate a success rate of approximately 21% of the disciplinary determinations challenged by inmate appeal. Statistics compiled over the last eight months by the Texas Department of Corrections show a success rate of 10% of all appeals filed. Wyoming reports that approximately 10.8% of the appeals filed are granted in whole or in part.

Conditions of Prisons and Jails, A Report on Section 1983 Litigation, at 19 (1995). The administrative remedies provided by the states are a meaningful and expedient remedy to challenge erroneous determinations by prison administrators, and this Court should have no hesitance in establishing a rule that requires prisoners to redress grievances through state administrative and judicial channels before coming into federal court.

This Court has held that the legislative history of the Civil Rights Act indicates that "Congress did not intend that an individual be compelled in every case to exhaust administrative remedies before filing" a Civil Rights Action. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 507 (1982). However, in *Patsy*, the Court also recognized that inmate claims are different. The Court recognized that the exhaustion requirement in the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, for prisoner cases "carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective." *Patsy v. Board of Regents of State of Florida* 457 U.S. at 510.

The "narrow exception" recognized in *Patsy*, has recently been expanded by Congress. The Prison Litigation Reform Act, signed into law by the President on April 26, 1996, requires inmates to exhaust state administrative remedies before bringing any section 1983 claim, and no longer limits the exhaustion requirement to those states whose administrative appeal processes have been certified under CRIPA. 42 U.S.C. § 1997e(a) (as amended April 26, 1996). This greater deference to state administrative remedies required by the Prison Litigation Reform Act, reflects an appreciation on the part of Congress that state administrative remedies pose a faster and more efficient way of addressing inmate

claims than federal litigation, and present an expedient method of dealing with inmate complaints that frequently lack merit. H.R. Rep. No. 21, 104th Cong. 1st Sess., at 13 (1995); 141 Cong. Rec. S5150 (daily ed. April 4, 1995) (Statement of Sen. Hatch); 141 Cong. Rec. S7526 (May 25, 1995) (Statement of Sen. Dole); 141 Cong. Rec. S14611 (Sept. 25, 1995) (Statement of Sen. Dole).[7]

The States offer remedial schemes that are capable of enforcing the constitution. All state prison systems operate elaborate administrative appeals processes that offer meaningful review of prisoner grievances. State courts also address prisoner claims and capably redress constitutional error. State courts also fashion rules in prisoner cases that may exceed those required by the constitution in order to adhere to state law or reach a just determination of a prisoner dispute. There is no basis for this Court to conclude that state remedies afforded to prisoners are ineffective or that state courts do not adequately protect constitutional rights.

7. In the area of prison administration, Congress no longer appears to have a mistrust for the "fact finding processes of state institutions" that was relied upon by the Court in reaching the no exhaustion rule announced in *Patsy*. *See*, *Patsy v. Board of Regents of State of Florida*, 457 U.S. at 504; Schwartz, The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 De Paul L.Rev. 85, 98 (1988).

II.

FEDERAL HABEAS CORPUS IS THE PROPER REMEDY TO CORRECT PROCEDURAL OR SUBSTANTIVE DUE PROCESS ERRORS IN PRISON ADMINISTRATIVE HEARINGS.

In *Bell v. Wolfish*, 441 U.S. 520, 526-527 n.6 (1979), this Court left for another day whether the remedy of habeas corpus is available to obtain review of conditions of confinement, as distinct from the fact or length of the confinement itself. In contrast to this Court's statement in *Bell*, the weight of circuit court authority supports the use of habeas corpus by the lower federal courts to address prison condition claims rather than requiring that such actions be brought under § 1983. See, Schwartz, *supra*, at 150n.394.

The Amici States believe that one class of prisoner claims is most amenable to resolution in habeas corpus. When a prisoner challenges the outcome of a prison administrative proceeding on procedural or substantive due process grounds, his remedy is federal habeas corpus.[8] The relevant interest at stake in such cases concerns protection "not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The expedient correction of mistakes in the procedure or result in such cases should be the objective

8. In asserting this argument, the Amici States seek a broader rule than that advanced by the petitioners. Proceeding in habeas corpus is the proper remedy for all procedural on substantive due process claims filed by prisoners challenging administrative decisions, not just those involving credit losses. Moreover, as explained below, favorable termination of a prisoner's challenge to the prison administrative proceeding should be a prerequisite to a § 1983 damages claim.

of the primary remedy afforded to state prisoners, and a necessary prerequisite to the recovery of damages.

The reason why habeas corpus should be the means for prisoners to correct errors of procedural or substantive due process, derives partly from the nature of liberty interests that are protected in a prison context. In *Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293 (1995), this Court moved away from determining whether or not states create constitutionally protected liberty interests by using mandatory language in their regulations, and returned to determining whether or not state-conferred privileges affected interests of sufficient weight to merit due process protection. A protected state-created liberty interest is an interest "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 115 S.Ct. at 2300. A challenge to a prison practice that presents "such a dramatic departure from the basic conditions" of a prisoner's confinement as to be protected by the Due Process clause, should properly fall within the scope of habeas corpus. *Sandin v. Connor*, 115 S.Ct. at 2301. Habeas corpus is the proper means to seek release from unlawful physical restraint. *Preiser v. Rodriguez*, 411 U.S. at 485-486.

Established principles of tort law also compel the conclusion that federal habeas corpus is the proper remedy for prisoners seeking to challenge administrative determinations under the Due Process Clause, and a prerequisite to a claim for damages under § 1983. "In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question

- just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law." *Carey v. Piphus*, 435 U.S. at 258-259. In cases like this one, the interest sought to be protected is the unjustified deprivation of liberty. *Carey v. Piphus*, 435 U.S. at 259. That interest is best served through the swift and summary nature of habeas corpus, rather than a plenary civil rights action filed under § 1983. See, *Preiser v. Rodriguez*, 411 U.S. at 495-496.[9]

Although prison administrative proceedings are not criminal prosecutions, *Wolff v. McDonnell*, 418 U.S. 539, 556 (1979), see *Cleavenger v. Saxner*, 474 U.S. 193, 206 (1986), the analogy to the tort of malicious prosecution applied in *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364, 2371 (1994), applies with equal force in this case. The interest to be compensated in a due process damages claim and a tort action for malicious prosecution is the same one. Both the constitutional tort and its common law counterpart are intended to compensate harm caused by defective process. Malicious prosecution extends to administrative proceedings and the action is bounded essentially by the same rules and limitations that apply if the underlying action is a criminal proceeding, including favorable termination. Prosser and Keeton, Torts 5th Ed., § 120 pgs. 891-893

---

9. Requiring the favorable termination of a procedural or substantive due process challenge to a prison administrative hearing before a § 1983 claim will lie, also prevents prisoners from circumventing the most efficacious remedy available to challenge a deprivation of liberty. Prisoners should not be placed in the situation of waiting for effective relief because they put the wrong label on their pleadings. See, *Preiser v. Rodriguez*, 411 U.S. at 489-490. Similarly, an exhaustion requirement will have the salutary effect of mitigating any harm caused by an unlawful deprivation of liberty by requiring them to pursue relief through a summary proceeding.

(1985); see *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942).

Just as in *Heck*, prisoners challenging administrative proceedings that impact a liberty interest on due process grounds are seeking damages for confinement imposed following a legal process. *Heck*, 114 S.Ct. at 2371. The requirement that prisoners must successfully proceed in habeas corpus to challenge the results of administrative hearings before suing for damages also avoids the possibility of conflicting resolutions arising out of the same transaction. *Heck*, 114 S.Ct. at 2371. Finally, a rule that favorable termination of a challenge to prison administrative hearings is a prerequisite to a § 1983 action for damages incurred as a result of those proceedings avoids troubling statute of limitation questions. *Heck*, 114 S.Ct. at 2373.

It also cannot be assumed that an action for damages will necessarily ensue after a successful challenge to a prison administrative hearing in a state or federal forum. In *Heck*, the Court opined that a § 1983 claim for using the wrong procedures could be distinguished from a claim challenging a wrong result that must proceed by habeas. *Heck*, 114 S.Ct. at 2370 (distinguishing *Wolff v. McDonnell*, 418 U.S. 539). However, a claim challenging the procedure employed in a particular hearing, necessarily sets aside the result of that proceeding, if only temporarily pending a rehearing. See, e.g., *Raditch v. U.S.*, 929 F.2d 478, 481 (9th Cir. 1991) ("A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits."). The procedural guidelines for prison disciplinary cases announced in *Wolff* do not lend themselves to the predetermination that a violation of *Wolff* procedures will or will not affect the outcome of a prison hearing. Hence, the distinction between a

challenge to procedure and a challenge to a result does not provide a workable rule. Moreover, even in cases that find a procedural due process violation, habeas corpus may provide complete relief.

In *Carey v. Piphus*, 435 U.S. at 260, the Court recognized that if a procedural due process error is harmless, and later proceedings produce the same result as the flawed hearing, a claim for damages for injuries caused by the original determination would not lie. Any award in such circumstances would constitute a windfall, rather than compensation to the aggrieved party. Similarly, where a party cannot prove that they suffered actual injury as a result of a procedural due process violation, only nominal damages will lie. *Carey v. Piphus* 435 U.S. at 266. In both types of cases, the remedy of habeas corpus will provide adequate relief by correcting the error in the underlying proceedings, and § 1983 actions for damages should not ensue because the offended constitutional right will be vindicated. Damages cases should only follow when the error in the proceeding caused actual injury to the plaintiff. *Carey v. Piphus*, 435 U.S. at 266-267.[10]

---

10. As this Court observed in *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), a liberty interest is substantive, and is not the right to demand needless formality. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* In prisoner cases of harmless error, the Court could properly conclude that no damage action accrues in the absence of actual harm. "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, ___ U.S. ___ (1996) (U.S. LEXIS 4220 (1996)).

In *Allen v. McCurry*, 449 U.S. 90, 105 n.24 (1980), the Court stated that habeas corpus and § 1983 suits should not be fungible remedies. Indeed they are not, and it should clearly be stated that when an action must be brought under 28 U.S.C. § 2254 it is not at the same time cognizable under § 1983.[11] A clear rule on the distinct nature of these claims will eliminate uncertainty and the potential harsh consequences that may befall litigants who chose the wrong form of action. Compare, *Silverton v. Dept. of the Treasury*, 644 F.2d 1341 (9th Cir. 1981) (plaintiff foreclosed in a § 1983 action from re-litigating an issue lost in state habeas corpus), and *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990) (civil rights action should be stayed, not dismissed, so plaintiff could exhaust state remedy). When a prisoner challenges an administrative proceeding on due process grounds, the immediate federal action is one for habeas corpus, and it is the nature of the prisoner's claim, not the relief a prisoner seeks, that compels that determination. Only if a challenge to a prison administrative proceeding terminates in favor of a prisoner, and the prisoner suffers actual harm, should a damages claim be filed under § 1983.[12] But cf. *Wolff v. McDonnell*, 418 U.S. at 554-

11. Any such rule would not undermine the cases that state the same constitutional rights can be redressed under either form of relief. *Wolff v. McDonnell*, 418 U.S. at 579. Rather, the "demarcation line" in cases would require correction of constitutional error in a state or federal forum before a damages claim to redress the same constitutional right would arise under § 1983.

12. Although the proper federal remedy to correct error in a prison administrative hearing is habeas corpus, the favorable termination requirement should be imposed as a prerequisite to a damages claim even if this Court determines such challenges need not proceed by habeas corpus.

555 (§ 1983 could go forward while restoration of good time sought in state proceedings).

III.

A HOLDING THAT PRISON ADMINISTRATIVE PROCEEDINGS MUST BE FOUND INVALID BEFORE A PRISONERS' PROCEDURAL OR SUBSTANTIVE DUE PROCESS CLAIM FOR DAMAGES ACCRUES UNDER THE CIVIL RIGHTS ACT STRIKES A PROPER BALANCE BETWEEN THE RIGHTS OF THE STATES AND THE RIGHTS OF AGGRIEVED PRISONERS.

Principles of comity and federalism require that the states be afforded the opportunity to correct errors of constitutional significance in state prison administrative hearings. All the states have grievance procedures available to state prisoners, and state courts provide a meaningful forum for prisoner disputes.

The remedy of habeas corpus is a swift and summary means of adjudicating prisoner claims, and is particularly suitable for correcting error in procedures that result in the deprivation of constitutionally protected liberty. A rule requiring prisoners to exhaust state remedies will have the effect of quickly resolving due process claims. Prisoners will benefit by achieving meaningful relief faster than they would in a regular plenary action, and the states and federal courts will be saved the attendant burden and expense of a plenary federal proceeding.[13]

13. In recent years, the federal courts have been burdened with an explosion of prisoner litigation, much of it is recreational and without merit, and serves no purpose other than to disrupt the fair and orderly allocation of judicial resources. *See*, *Young v. Selsky*, 41 F.3d 47, 54-56 (2d Cir. 1994) (Van Graffeiland dissenting) *cert. denied*, ___ U.S. ___, 115 S.Ct. 1837 (1995). When the Administrative Office of the U.S. Courts began tracking state prisoner civil rights cases in 1966, 218 cases were counted nationally. By 1992 the number climbed to 26,824. R. Hanson & Daly, *supra*, at 2.

In cases of harmless error, or where a prisoner has suffered no actual harm as a result of a procedural due process violation, habeas corpus may afford the prisoner complete relief. In other cases, the requirement that a prisoner exhaust available state remedies ensures the states that conflicting results will not arise from the same transactions. An exhaustion rule also provides certainty for statute of limitation purposes.

Approximately half of all prisoner cases that enter the federal court system "concern matters that could and probably should be handled through state administrative procedures." R. Hanson and H. Daly, *supra*, at 39. "Prisoners' grievances need to be channeled to other forms of relief, such as habeas corpus, ... These other forms of resolution might be more satisfying to the prisoner while embracing the ability of the courts to deal with the more serious cases involving the more difficult task of establishing credibility and liability." *Id.* at 39-40.

A holding that a claim for damages for a due process violation accrues to a state prisoner only after an administrative proceeding has been held invalid may result in delay of a prisoner's opportunity to seek damages from prison officials, but is outweighed by other considerations of federalism, fairness and judicial economy.

CONCLUSION

For the reasons stated above, in the Petition for Writ of Certiorari, and in the Brief for the Petitioner's, the decision of the Ninth Circuit should be reversed, and prisoners challenging administrative hearings should be required to exhaust state remedies, proceed in habeas corpus, and obtain a favorable termination before seeking damages for due process violations under 42 U.S.C. § 1983.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS*
Senior Assistant Attorney General

Attorneys for Amici States

*Counsel of Record is grateful for the substantial assistance of New York Assistant Attorney General Martin Hotvet in the preparation of this brief.

June 26, 1996

No. 95-1352

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

GARY EDWARDS and TANA WOOD,

Petitioners,

v.

JERRY B. BALISOK,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND NORMAN GOTCHER, JR., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

KATRIN E. FRANK
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

DAVID C. FATHI*
JOHN MIDGLEY
PATRICIA J. ARTHUR
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 301
Seattle, WA 98104
(206) 464-0838

DON SAUNDERS
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1625 K Street NW
Suite 800
Washington, DC 20006
(202) 452-0620

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE COURT SHOULD NOT ABANDON THE TEST SET FORTH IN *HECK v. HUMPHREY* ... 6

A. The *Heck* Test 6

B. Petitioners' Proposed Rule Would Require This Court to Abandon *Heck* and *Wolff* 9

C. Petitioners Ask This Court to Narrow the Scope of § 1983 for Policy Reasons, A Decision That Properly Belongs to Congress ... 14

D. The Remaining Arguments of Petitioners and State Amici Are Unpersuasive 17

E. This Court Should Affirm the Judgment Below 18

II. A STATE PRISONER NO LONGER IN CUSTODY MAY SEEK DAMAGES FOR LOSS OF GOOD TIME CREDITS IN AN ACTION UNDER § 1983 19

A. A § 1983 Damages Action By a Person Who Has Completed His Sentence Cannot Result in Restoration of Good Time Credits 20

B. A § 1983 Damages Action is the Only Federal Remedy for a Former Prisoner Who Was Deprived of Good Time Credits in Violation of His Federal Constitutional Rights 21

TABLE OF CONTENTS – Continued

Page

III. A STATE PRISONER MAY SEEK PROSPECTIVE INJUNCTIVE RELIEF REGARDING PRISON DISCIPLINARY PROCEDURES UNDER § 1983..... 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Armento-Bey v. Harper, 68 F.3d 215 (8th Cir. 1995) 10

Carey v. Piphus, 435 U.S. 247 (1978) 19, 23

Cleavinger v. Saxner, 474 U.S. 193 (1985) 23

Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995)... 1, 3, 10, 16

Heck v. Humphrey, 114 S. Ct. 2364 (1994) ..... *passim*

Helling v. McKinney, 113 S. Ct. 2475 (1993) 26

Hudson v. McMillian, 503 U.S. 1 (1992) 17

Kruger v. Erickson, 77 F.3d 1071 (8th Cir. 1996) 13

Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)..... 18

Miller v. Indiana Department of Corrections, 75 F.3d 330 (7th Cir. 1996).....9, 20

Moor v. County of Alameda, 411 U.S. 693 (1973) 17

Morgan v. Ward, 699 F. Supp. 1025 (N.D.N.Y. 1988) 19

Patsy v. Board of Regents, 457 U.S. 496 (1982) ... 14, 15, 16

Powell v. Ward, 643 F.2d 924 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981)..... 19

Preiser v. Rodriguez, 411 U.S. 475 (1973) 8, 9, 11, 13, 21, 22

Robertson v. Wegmann, 436 U.S. 584 (1978)..... 17

Sandin v. Conner, 115 S. Ct. 2293 (1995) 12, 13

Sheldon v. Hundley, 83 F.3d 231 (8th Cir. 1996)....14, 20

Smith v. Wade, 461 U.S. 30 (1983) 19

TABLE OF AUTHORITIES – Continued

Page

Tower v. Glover, 467 U.S. 914 (1984)..... 15

Wolff v. McDonnell, 418 U.S. 539 (1974)..... *passim*

Wood v. Gotcher, Supreme Court No. 95-1385 .....1, 19

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amendment 14 8

STATUTES AND REGULATIONS:

28 U.S.C. § 2254.....4, 6, 14, 21, 22

42 U.S.C. § 1983..... *passim*

42 U.S.C. § 1988..... 17

42 U.S.C. § 1997e..... 15

Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*..... 15

Prison Litigation Reform Act of 1995, Pub. L. 104-134..... 15

Wash. Admin. Code § 137-28-350 13

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union of Washington is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Thus, the ACLU has a particular interest in the remedies available to prisoners for deprivations of liberty without due process of law.

The National Legal Aid and Defender Association (NLADA) is the largest national organization devoting all of its resources to ensuring equal access to the justice system for all poor people, including those in our Nation's prisons. NLADA's Institutions and Alternatives Section was established in 1991 to better inform and coordinate advocacy on behalf of persons in prisons and other institutions and to protect the rights of institutionalized persons.

Norman Gotcher, Jr., is a citizen of Washington who was, until 1995, a prisoner in the Washington Department of Corrections. While incarcerated, he brought a due process challenge, under 42 U.S.C. § 1983, to prison disciplinary procedures which resulted in his loss of good time credits. The district court dismissed his complaint, but the court of appeals reversed and remanded for further proceedings. *Gotcher v. Wood*, 66 F.3d 1097, 1098-99 (9th Cir. 1995). The State of Washington sought certiorari; the petition is currently pending before this Court. *Wood v. Gotcher*, No. 95-1385. The petition in *Gotcher* raises issues

similar to those before the Court in the instant case. Therefore, Mr. Gotcher has a strong interest in the Court's resolution of this case.

The parties have agreed to the filing of this brief, as indicated by their letters of consent filed with the Clerk of this Court.

STATEMENT OF THE CASE

Respondent Jerry B. Balisok, a prisoner at the Washington State Penitentiary at Walla Walla, filed this action in the district court under 42 U.S.C. § 1983. He alleged that he was subjected to a prison disciplinary proceeding which resulted in the loss of good time credits and other sanctions, and which did not comply with the requirements of the Due Process Clause of the Fourteenth Amendment. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") at I-2, I-6.[1] Respondent sought a declaration that he had been subjected to unconstitutional disciplinary procedures, an order prospectively enjoining such procedures, and "compensatory and punitive damages for the harm sustained from the use of unconstitutional procedures." He did not seek restoration of his good time credits. *Id.* at I-10.

[1] More specifically, respondent alleged that petitioner Edwards, a prison administrator, interfered with his ability to collect and present exculpatory evidence. Pet. App. at I-3 – I-7. He further alleged that prison officials habitually engaged in such interference with regard to prisoners who, like respondent, are "jail house attorneys." *Id.* at I-4.

The district court stayed the action and certified the case for immediate appeal. Pet. App. at F-14 – F-15. The district court found that if "the disciplinary hearing at issue did violate [respondent's] due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." *Id.* at F-11. Relying on this Court's decision in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), the district court concluded that "the appropriate procedure is to stay [respondent's] § 1983 action pending resolution of the good-time claim in state courts." Pet. App. at F-14.

Both parties appealed, and the court of appeals reversed the district court's order staying the action and remanded for further proceedings. Joint Appendix (hereinafter "J.A.") at 9-10. The court of appeals relied on its recent decision in *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995), in which it had held that "an inmate's challenge to the procedure by which he was denied good-time credits did not call into question the lawfulness of his continuing confinement and was not barred by *Heck v. Humphrey*." J.A. at 10.

The petitioners sought certiorari, and this Court granted the writ on April 29, 1996.

SUMMARY OF ARGUMENT

In *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), this Court held that a state prisoner cannot bring a damages action under 42 U.S.C. § 1983 for constitutional violations leading to his conviction, if success in that action would

necessarily imply the invalidity of his outstanding criminal conviction. The Court in *Heck* also reaffirmed its holding in *Wolff v. McDonnell*, 418 U.S. 539 (1974), that a prisoner may bring a damages action for use of unconstitutional prison disciplinary procedures in depriving him of good time credits, if the unconstitutionality of those procedures does not necessarily vitiate the denial of good time, and the action therefore does not call into question the lawfulness of the prisoner's continuing confinement.

The courts of appeals have uniformly followed *Heck* and held that a prisoner may not bring a § 1983 damages action for wrongful disciplinary procedures if success in that action would necessarily result in restoration of the prisoner's good time. Conversely, if the claim is simply for using the wrong procedures, and does not necessarily implicate the loss of good time, the action may proceed under § 1983. This was the rule applied by the court of appeals below.

Petitioners propose a radically new rule that would require this Court to abandon both *Heck* and *Wolff*. Petitioners' proposed rule is unintelligible and would defy easy or consistent application in the lower courts. It is unsupported by either the language or the legislative history of § 1983 or 28 U.S.C. § 2254. Petitioners' arguments in support of their proposed rule are policy arguments about the optimal scope of § 1983, and are properly addressed to Congress rather than this Court.

The Court should decline petitioners' invitation to abandon *Heck* and *Wolff*. It should hold, consistent with those cases, that a state prisoner may bring an action

under § 1983 for a deprivation of procedural due process in a prison disciplinary proceeding, as long as success in that action would not necessarily result in restoration of good time credits taken in that proceeding. It should then affirm the judgment of the court of appeals, because respondent's success in his § 1983 action would not necessarily result in restoration of his good time.

A fortiori, a former state prisoner who has completed his sentence, like amicus Gotcher, may directly seek damages under § 1983 for wrongful deprivation of good time credits, since the restoration of good time cannot possibly result from the § 1983 action. Because such a person is not in custody, and therefore cannot invoke federal habeas corpus jurisdiction to seek restoration of his credits, damages under § 1983 are the only federal remedy for the violation of his federal constitutional rights. Absent the possibility of proceeding under the more specific habeas corpus statute, the plain language of § 1983 grants the former prisoner a cause of action for damages for wrongful deprivation of good time credits.

Finally, *Heck* left undisturbed *Wolff's* holding that a state prisoner may seek prospective injunctive relief from unconstitutional prison disciplinary procedures. A claim for such relief does not call into question the lawfulness of the plaintiff's continuing confinement.

ARGUMENT

I. THE COURT SHOULD NOT ABANDON THE TEST SET FORTH IN *HECK v. HUMPHREY*

A. The *Heck* Test.

In *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), a state prisoner filed suit in federal court under 42 U.S.C. § 1983, alleging that police and prosecutors had committed various constitutional violations in the investigation and trial that ultimately led to his conviction of voluntary manslaughter. 114 S. Ct. at 2368. The complaint sought, among other relief, monetary damages; it did not seek injunctive relief or Heck's release from custody. *Id.*

This Court affirmed the dismissal of Heck's § 1983 complaint.

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his

> conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

114 S. Ct. at 2372 (footnote omitted, emphasis in original).[2]

The Court made clear that a plaintiff can still bring a § 1983 suit challenging unconstitutional procedures, if success in that action would not necessarily imply the invalidity of the plaintiff's conviction:

> [I]f the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 2372-73 (footnotes omitted, emphasis in original). The Court gave an example of a § 1983 suit that would be permissible under the *Heck* rule:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting

---

[2] In *Heck*, the district court and the court of appeals had both characterized Heck's monetary claims as challenging the legality of his conviction. Heck had not disputed this characterization until he filed his reply brief in this Court. The Court declined to consider the untimely argument, and accepted the characterization of the lower courts, stating the issue before it as "whether money damages premised on an unlawful conviction could be pursued under § 1983." 114 S. Ct. at 2368 n. 2.

> in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.

Heck, 114 S. Ct. at 2372 n. 7 (citations omitted, emphasis in original); *accord, id.* at 2379 n. 4 (Souter, J., concurring in the judgment).

The *Heck* Court also discussed, and reaffirmed, its holding in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, a Nebraska state prisoner, on behalf of himself and other prisoners, filed a complaint under § 1983, alleging that disciplinary proceedings that resulted in the taking of good time credits did not comply with the Due Process Clause of the Fourteenth Amendment. 418 U.S. at 542-43. The complaint sought restoration of good time; submission of a plan by prison authorities for a hearing procedure in connection with forfeiture of good time that complied with the requirements of due process; and damages for deprivation of civil rights resulting from use of the allegedly unconstitutional procedures. *Id.* at 553.

The Court held that the claim for restoration of good time credits was foreclosed by *Preiser v. Rodriguez*, 411 U.S. 475 (1973).[3] However, it held that the damages claim was "properly before the District Court and required determination of the validity of the procedures employed

---

[3] *Preiser* held that when a prisoner seeks restoration of good time credits, and therefore challenges the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus. 411 U.S. at 500.

for imposing sanctions, including loss of good time." *Wolff*, 418 U.S. at 554.

The *Heck* Court characterized *Wolff* as follows:

> [W]e think this passage recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Heck, 114 S. Ct. at 2370 (emphasis in original).

B. Petitioners' Proposed Rule Would Require This Court to Abandon *Heck* and *Wolff*.

Heck, read in conjunction with *Preiser* and *Wolff*, suggests that a prisoner may not bring a § 1983 damages action for unconstitutional disciplinary procedures when that action, if successful, would *necessarily* result in restoration of the prisoner's good time. Conversely, when the claim is "for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits)," the claim does not "call into question the lawfulness of the plaintiff's continuing confinement," *see Heck*, 114 S. Ct. at 2370, and the action may proceed under § 1983. This is the rule the courts of appeals have applied uniformly and without difficulty since *Heck*. *Miller v. Indiana Department of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996);

Armento-Bey v. Harper, 68 F.3d 215, 216 (8th Cir. 1995); *Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995).[4]

Nevertheless, petitioners urge this Court to reject this straightforward test, and instead advocate a rule that would require the abandonment of both *Heck* and *Wolff*. Petitioners would have federal courts disregard as irrelevant the very issue this Court identified as decisive in *Heck*: whether success on the § 1983 claim would *necessarily* invalidate the prisoner's continuing confinement. *Compare Heck*, 114 S. Ct. at 2372 ("the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence") *with* Brief of Petitioners at 24 ("[t]he bright-line rule can be applied . . . without the need to resolve troublesome 'fact-bound issue[s]' such as whether the claim would necessarily invalidate the result of the hearing").[5]

---

[4] The ease and consistency with which the courts of appeals have applied this test belies the unsupported contention of the State of California, *et al.* (hereinafter "state amici") that "the distinction between a challenge to procedure and a challenge to a result does not provide a workable rule." Brief of State Amici at 16-17.

[5] Petitioners' assertion elsewhere in their brief that their proposed "bright-line rule" is consistent with *Heck* (Brief of Petitioners at 28 n. 19) is untenable in light of this language. Similarly, petitioners' contention that an attack on disciplinary procedures is equivalent to an attack on the substantive result of those procedures, Brief of Petitioners at 17, cannot be reconciled with the holding of *Wolff*, recently reaffirmed in *Heck*. *See* 114 S. Ct. at 2370.

Petitioners propose that:

> exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a prison disciplinary hearing.

Brief of Petitioners at 7. Although petitioners characterize this as a "bright-line rule," *id.*, it is clear that such a rule would defy easy, consistent, or even intelligible application.[6]

Under *Heck*, the district court simply examines the relief sought by the § 1983 plaintiff, and determines whether this relief, if granted, would "necessarily" result in restoration of good time. *See* 114 S. Ct. at 2372.[7] Under petitioners' proposed rule, by contrast, the district court must embark on a speculative voyage that has no end. To

---

[6] Indeed, petitioners are apparently unable even to state their proposed rule in a consistent fashion. In addition to the "could also support a claim" language quoted above, petitioners variously phrase their rule as follows: "could state a claim" (Brief of Petitioners at 8); "would state a claim" (*id.* at 17); and "would support a claim" (*id.* at 24). It is obvious that "would" and "could" are not synonyms; nor are the terms "state a claim" and "support a claim."

[7] Petitioners' fear that application of the *Heck* rule "gives prisoners, rather than courts, the power to decide questions of federal court jurisdiction," Brief of Petitioners at 19, is unfounded. This Court has long recognized that it is the essence of the claim, not the label placed upon it by the prisoner-plaintiff, that determines the availability of federal judicial relief. *See Preiser*, 411 U.S. at 489-90.

determine whether, "no matter what relief is requested," the plaintiff's allegations "could also support" a claim for restoration of good time – for example, in some future state proceeding – the district court would have to explore complex issues of state law such as *res judicata* and statutes of limitations, as well as substantive and procedural state law governing loss of good time credits. This hardly represents a gain in clarity and simplicity over the *Heck* rule.

Petitioners identify no reason why the *Heck* test, announced only two years ago, should now be abandoned. Indeed, in *Heck* itself, the Court considered, and rejected, a test similar to that now advocated by petitioners. *Compare Heck,* 114 S. Ct. at 2373, *with* Brief of Petitioners at 24.

The state amici join petitioners in urging the overthrow of *Wolff* and *Heck,* but go even further, urging that "habeas corpus is the proper remedy for all procedural o[r] substantive due process claims filed by prisoners challenging administrative decisions, not just those involving credit losses." Brief of State Amici at 13 n. 8. Of course, this Court rejected such a rule two Terms ago when, in *Heck,* it reaffirmed *Wolff's* holding that a prisoner may bring a § 1983 action "for using the wrong [disciplinary] procedures, not for reaching the wrong result." 114 S. Ct. at 2370.[8]

---

[8] Last Term, this Court again implicitly rejected the rule proposed by state amici. In *Sandin v. Conner,* 115 S. Ct. 2293 (1995), the prisoner was convicted of disciplinary infractions, and sentenced to disciplinary segregation. 115 S. Ct. at 2296. Before his administrative appeal was decided, Conner filed a § 1983 action in federal court, alleging a deprivation of procedural due process in connection with his disciplinary hearing. *Id.*

Under the rule proposed by state amici, Conner would have had no cause of action under § 1983. However, no Member of the *Conner* Court questioned the propriety of a § 1983 action as a vehicle for challenging a deprivation of procedural due process in a prison disciplinary hearing.

The rule proposed by the state amici completely ignores the nature and historical function of habeas corpus. "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser,* 411 U.S. at 484. Thus, a prisoner challenging a disciplinary proceeding that does not affect the length of his custody simply has no remedy in habeas corpus and therefore, under the rule proposed by state amici, has no remedy at all. "If the prisoner is not challenging the validity of his conviction or the length of his detention, such as loss of good time, then a writ of habeas corpus is not the proper remedy." *Kruger v. Erickson,* 77 F.3d 1071, 1073 (8th Cir. 1996).[9]

---

[9] Petitioners' assertion that "the purpose of due process at a prison disciplinary hearing is to prevent the arbitrary or unjustified denial of good-time credits," Brief of Petitioners at 8, 17, is incorrect. As petitioners themselves concede, violation of Washington's prison disciplinary code "can result in a number of sanctions, including a loss of good-time credits." *Id.* at 3. In reality, prison disciplinary proceedings result in a wide variety of outcomes, most of which have no bearing on the length of the prisoner's confinement. *See* Wash. Admin. Code § 137-28-350(1) (enumerating possible sanctions for a serious infraction, including "[c]onfinement on segregation status" and "[c]onfinement on isolation status"). It is clear that habeas corpus will not be available as a remedy for procedural due

C. Petitioners Ask This Court to Narrow the Scope of § 1983 for Policy Reasons, A Decision That Properly Belongs to Congress.

Petitioners and state amici do not argue that their position is supported by the language or legislative history of either § 1983 or § 2254. Rather, they start with the proposition that prisoners should, as a matter of sound public policy, be required to exhaust state remedies before seeking relief in federal court. Therefore, they argue, this Court should bar prisoners from challenging unconstitutional disciplinary procedures under § 1983, since that statute contains no exhaustion requirement.[10] *See, e.g.*, Brief of Petitioners at 19-24; Brief of State Amici at 10-11, 20-21.

Such arguments amount to an invitation to this Court to usurp the legislative function of Congress, and have been consistently rejected by the Court. "It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 512

---

process violations in these situations. "[P]risoners who challenge disciplinary rulings that do not lengthen their sentence are probably outside the habeas statute[.]" *Sheldon v. Hundley*, 83 F.3d 231, 234 (8th Cir. 1996).

[10] Any suggestion that § 1983 is or should be subject to an exhaustion requirement is foreclosed by *Heck*, which reaffirmed that, with specific statutory exceptions, it is not. 114 S. Ct. at 2370. Therefore, if respondent's claim is cognizable under § 1983, exhaustion is not required, except as required by statute.

(1982). *See also Tower v. Glover*, 467 U.S. 914, 922-23 (1984).[11]

Indeed, the arguments of petitioners and the state amici in this case are remarkably similar to those unsuccessfully made by the state defendant in *Patsy*, urging that § 1983 should be subject to an exhaustion requirement:

> Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts; would further the goal of comity and improve federal-state relations by postponing federal-court review until after the state administrative agency had passed on the issue; and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.

---

[11] Congress is capable of restricting recourse to § 1983 by state prisoners when it sees fit to do so. In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et seq.* As originally enacted, CRIPA permitted courts to require adult convicted prisoners to exhaust administrative remedies before bringing a § 1983 action, if such administrative remedies met minimum standards promulgated by the Attorney General of the United States. 42 U.S.C. § 1997e(a); *see also Patsy*, 457 U.S. at 507-11. In 1994, CRIPA was amended by Congress to permit courts to require exhaustion if administrative remedies are "otherwise fair and effective," even if they do not meet the federal minimum standards. 42 U.S.C. § 1997e(a)(2); Pub. L. 103-322, § 20416(a)(1)(B). The Prison Litigation Reform Act of 1995, Pub. L. 104-134, further restricts the availability of § 1983 to prisoners.

> As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. Furthermore, . . . the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.

Patsy, 457 U.S. at 512-13 (citations, footnotes omitted). *Compare, e.g.*, Brief of State Amici at 20-21.[12]

---

[12] Petitioners' reasoning repeatedly begs the question. For example, petitioners criticize the decision in *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995), on the ground that it "leads to results that are at odds with the exhaustion requirement." Brief of Petitioners at 19. Of course, the very question before this Court is whether such an "exhaustion requirement" exists – or more precisely, whether respondent's only federal remedy is habeas corpus, which, unlike § 1983, contains an exhaustion requirement.

Petitioners' policy arguments are not only made in the wrong forum; they are also internally inconsistent. For example, petitioners' concern for "unsophisticated pro se litigants" who will "languish in civil rights actions merely because they failed to clearly specify their claim for freedom from an unlawful confinement," Brief of Petitioners at 22, is difficult to reconcile with petitioners' assurance that "[f]ederal courts are well versed in reviewing prisoner complaints" and "are not limited by the relief expressly sought in the complaint." *Id.* at 24.

D. The Remaining Arguments of Petitioners and State Amici Are Unpersuasive.

Petitioners' reliance on 42 U.S.C. § 1988 (*see* Brief of Petitioners at 25-26) is wholly misplaced. That statute governs the choice of federal versus state law in federal civil rights actions. *See Robertson v. Wegmann*, 436 U.S. 584, 588 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 705-06 (1973). In no way does it "provide[] additional authority for federal courts to define the principles of exhaustion" (*see* Brief of Petitioners at 25) that petitioners believe should apply to prisoner civil rights suits.

Similarly, petitioners incorrectly argue that "[d]octrines of abstention provide additional support for the importance of exhaustion in this case." Brief of Petitioners at 15 n. 7. As this Court recognized in *Heck*, the appropriateness of abstention is a separate question that arises only after a determination that the action is proper under § 1983. *See* 114 S. Ct. at 2272-73 and n. 8.

Finally, the state amici argue essentially that the federal courts can safely close their doors to state prisoners, since state institutions can be relied upon scrupulously to protect their rights. *See* Brief of State Amici at 11, 12 n. 7.[13] Unfortunately, this is too often not the case. *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 4, 12 (1992) (two correctional officers punched and kicked a handcuffed and shackled prisoner while their supervisor looked on and

---

[13] The arguments about the alleged efficacy of state remedies are difficult to evaluate, since they consist mostly of factual assertions unsupported by any citation to authority. *See* Brief of State Amici at 9-10, nn. 4, 5, 6.

told them "not to have too much fun;" trial court found that this was "not an isolated assault"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1280-81 (N.D. Cal. 1995) (finding "senseless suffering and sometimes wretched misery" caused by unconstitutional practices of California prison officials, and further finding that officials had "no serious or genuine commitment to significantly improving" such conditions).[14]

E. This Court Should Affirm the Judgment Below.

In sum, this Court should decline petitioners' invitation to abandon *Heck* a mere two years after it was decided. The Court should hold, consistent with *Heck*, that a state prisoner may bring an action under § 1983 for a deprivation of procedural due process in a prison disciplinary proceeding, as long as success in that action would not necessarily result in restoration of good time credits taken in that proceeding. The Court should then affirm the judgment of the court of appeals, because respondent's success in his action for unconstitutional procedures would not necessarily result in restoration of his good time credits. *See Heck*, 114 S. Ct. at 2372 n. 7.[15]

---

[14] The *Madrid* court found constitutionally inadequate medical and mental health care, a pattern of excessive force by correctional staff, housing conditions that constituted cruel and unusual punishment for mentally ill prisoners, and unconstitutional procedures used to place alleged gang members in segregation.

[15] This Court has made clear that a § 1983 plaintiff may recover damages for the mental and emotional distress caused by a denial of procedural due process, even if the substantive result would have been the same absent the due process violation. *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978). Of course, such damages must be proven in the usual manner. *Id.* In any event, a denial of procedural due process always entitles the plaintiff to nominal damages, even absent any evidence of actual injury. *Id.* at 266-67. *See, e.g., Powell v. Ward*, 643 F.2d 924, 934 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981) (affirming award of nominal damages for defective prison disciplinary proceedings); *Morgan v. Ward*, 699 F. Supp. 1025, 1045 (N.D.N.Y. 1988) (awarding nominal damages for due process violation in prison disciplinary proceedings). Moreover, in an appropriate case, punitive damages would also be available. *See Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also id.* at 55 n. 21.

Petitioners concede, as they must, that a denial of procedural due process is an independently compensable injury. Brief of Petitioners at 17.

[16] This is the posture in which amicus Gotcher now finds himself. *See* Respondent's Brief in Opposition, *Wood v. Gotcher*, No. 95-1385, at 4.

II. A STATE PRISONER NO LONGER IN CUSTODY MAY SEEK DAMAGES FOR LOSS OF GOOD TIME CREDITS IN AN ACTION UNDER § 1983

This Court has never had occasion to address directly the situation of a former state prisoner, no longer in custody, who seeks to challenge on due process grounds a prison disciplinary proceeding that resulted in a loss of good time credits, and therefore in a lengthening of his confinement.[16] However, it is clear that *Heck* permits a person in these circumstances to seek damages under § 1983 for the wrongful deprivation of good time.

A. A § 1983 Damages Action By a Person Who Has Completed His Sentence Cannot Result in Restoration of Good Time Credits.

Under *Heck*, a damages action for unlawful disciplinary procedures is not barred unless success in that action would necessarily result in a restoration of good time credits. *See* § I, *supra*. The rationale of *Heck* is that an action that would result in restoration of good time "call[s] into question the lawfulness of the plaintiff's continuing confinement," 114 S. Ct. at 2370, and therefore must proceed by habeas corpus. *See Miller*, 75 F.3d at 331 ("The reasoning of *Heck v. Humphrey* is that a prisoner should not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement"); *Sheldon*, 83 F.3d at 233 ("The [*Heck*] Court reasoned that a prisoner should not be able to use a suit for damages to avoid established procedures, like habeas corpus, for challenging the lawfulness of the fact or length of confinement").

However, when a prisoner has completed his sentence, there is no way that he can gain restoration of his good time credits, or otherwise "call into question the lawfulness of [his] continuing confinement." Therefore, under these circumstances, *Heck* does not bar an action for damages for wrongful deprivation of good time.[17]

---

[17] Indeed, such an action would not be barred even by the rule proposed by petitioners. Since a prisoner who has completed his sentence cannot gain restoration of forfeited good time credits, no action filed by such a prisoner "could also support a claim for restoration" of such credits. *See* Brief of Petitioners at 12; *see also id.* at 28 n. 19.

B. A § 1983 Damages Action is the Only Federal Remedy for a Former Prisoner Who Was Deprived of Good Time Credits in Violation of His Federal Constitutional Rights.

It is clear that a person who has completed his sentence is not "in custody," and therefore cannot seek habeas relief under 28 U.S.C. § 2254. *See Heck*, 114 S. Ct. at 2379 (Souter, J., concurring in the judgment). It is also clear that, once a person has completed his sentence, good time credits that were forfeited during his incarceration are irretrievably lost. Therefore, unless he can bring a damages action under § 1983, such a person will have no federal remedy, even if the prison disciplinary proceeding involved flagrant and intentional violations of his federal rights and resulted in a wrongful lengthening of his confinement. *See id.* at 2380 (Souter, J., concurring in the judgment).

This situation is fundamentally different from those presented in *Heck* and *Preiser*. In *Heck*, the state prisoner was still in custody. Therefore, he could (and did) challenge his conviction in a federal habeas corpus proceeding. *See* 114 S. Ct. at 2368. If successful in that proceeding, he could then have brought a § 1983 action for damages for wrongful conviction. *Id.* at 2372. Similarly, in *Preiser*, the prisoners, still in custody, could seek restoration of their good time credits through a habeas petition. *See Preiser*, 411 U.S. at 500.

By contrast, habeas corpus is not an available remedy for a person who is no longer in custody. "[T]he essence of habeas corpus is an attack by a person in custody upon

the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser,* 411 U.S. at 484.

In the absence of any possible remedy under the federal habeas statute, the plain language of § 1983 grants the former prisoner a cause of action for damages for wrongful deprivation of good time.

> [A]bsent such a statutory policy, surely the common law can give us no authority to narrow the "broad language" of § 1983, which speaks of deprivations of "any" constitutional rights, privileges or immunities, by "[e]very" person acting under color of state law, and to which "we have given full effect [by] recognizing that [§ 1983] provide[s] a remedy to be broadly construed, against all forms of official violation of federally protected rights."

Heck, 114 S. Ct. at 2380 (Souter, J., concurring in the judgment) (citations, internal quotation marks omitted).

Recognition of a cause of action in these circumstances does no violence to the notions of federal-state comity that underlie the exhaustion requirement of 28 U.S.C. § 2254. The policy embodied in that requirement is "that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody." *Heck,* 114 S. Ct. at 2373 n. 9. When a prisoner has completed his sentence, and seeks only damages for wrongful deprivation of good time credits that are now gone forever, this state interest is simply not implicated. *See also id.* at 2380 (Souter, J., concurring in

the judgment) (an award of federal damages is "a significantly less disruptive remedy than an order compelling release from custody").[18]

In sum, under *Heck,* a state prisoner no longer in custody may bring a § 1983 damages action for loss of good time credits, without first seeking habeas relief. For this Court to hold otherwise would be to leave persons in these circumstances without any federal remedy for violations of their federal constitutional rights.[19]

---

[18] Of course, the former prisoner would be required to demonstrate the unlawfulness of the deprivation of good time credits (and therefore an unlawful lengthening of his sentence) as a prerequisite to collecting damages for that deprivation in the § 1983 action.

[19] The Court in *Heck* cited "the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction." 114 S. Ct. at 2374 n. 10. However, this principle has no application in the case of a former prisoner seeking damages for a loss of good time credits, since it is well established that "[p]rison disciplinary proceedings are not part of a criminal prosecution." *Wolff,* 418 U.S. at 556. Indeed, this Court has recognized that the lack of procedural formality in prison disciplinary proceedings renders such proceedings more vulnerable than state court judgments to attack in civil rights actions. *See Cleavinger v. Saxner,* 474 U.S. 193, 205-06 (1985) (members of prison disciplinary committee are not entitled to absolute judicial immunity in *Bivens* action). More fundamentally, while this Court has stated that the common law of torts "provide[s] the appropriate starting point" for analysis of damages issues under § 1983, *Carey,* 435 U.S. at 258, the Court simultaneously recognized that the analogy is not always a useful one: "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Id.*

III. A STATE PRISONER MAY SEEK PROSPECTIVE INJUNCTIVE RELIEF REGARDING PRISON DISCIPLINARY PROCEDURES UNDER § 1983

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), a state prisoner filed a complaint under § 1983, challenging disciplinary proceedings that resulted in the taking of good time credits and seeking, *inter alia*, prospective injunctive relief. *See* § I.A., *supra*. This Court held that the claim for prospective injunctive relief from allegedly unconstitutional procedures was properly brought under § 1983. 418 U.S. at 554-55.

Amici recognize that although *Heck* specifically reaffirmed *Wolff's* holding that damages are available for use of unconstitutional disciplinary procedures, it did not discuss the availability of prospective injunctive relief to change such procedures. That omission, however, is easily understood. The prisoner in *Heck* sought no injunctive relief, so the issue was simply not before the Court. *See Heck*, 114 S. Ct. at 2368.

What is far more significant is that neither *Heck* nor any other decision of this Court has ever deviated from the holding in *Wolff* that a claim for prospective injunctive relief from unconstitutional prison disciplinary procedures is properly brought under § 1983.[20] Such a claim,

---

[20] This is so whether the claim is brought by an individual prisoner or as a class action. Contrary to petitioners' contention (*see* Brief of Petitioners at 9, 32-34), there is no indication in *Wolff*, or in any other decision of this Court, that the propriety of the claim under § 1983 turns on the presence or absence of class certification. *See* 418 U.S. at 553-55. It is the nature of the claim that governs, not the number of prisoners on whose behalf it is brought.

like a claim for damages for using the wrong disciplinary procedures, "[does] *not* call into question the lawfulness of the plaintiff's continuing confinement." *Heck*, 114 S. Ct. at 2370 (emphasis in original).[21]

The importance of prospective injunctive relief is illustrated by the case at bar. Respondent alleges not only that his own disciplinary hearing failed to comply with the requirements of due process, but that prison officials are engaged in a pattern of intentional misconduct with regard to such hearings. *See* Pet. App. I-4, ¶¶ 16-18. If prospective injunctive relief were not available under § 1983, federal courts would be completely powerless to

---

[21] Petitioners make much of the fact that respondent amended his complaint to omit his claim for restoration of good time credits, characterizing this action as "manipulation" and "abuse of § 1983 jurisdiction." Brief of Petitioners at 21. Petitioners do not explain why it is manipulative or abusive for a litigant to omit a claim once he has learned, as respondent did here, that the claim cannot lawfully be brought in the pending action. Petitioners' indignation is especially incomprehensible where, as here, the initial complaint was filed *pro se*, and the amended complaint was filed by counsel. *See* Pet. App. at H-33, I-10. Indeed, the filing of an amended complaint under these circumstances is entirely consistent with counsel's professional responsibility as an officer of the court.

halt even the most deliberate and egregious violations of federal constitutional rights.[22]

CONCLUSION

For all the reasons set forth above and in the Brief of Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

KATRIN E. FRANK
Cooperating Attorney
American Civil Liberties Union of Washington
705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

STEVEN R. SHAPIRO
American Civil Liberties Union
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

DAVID C. FATHI*
JOHN MIDGLEY
PATRICIA J. ARTHUR
Columbia Legal Services
101 Yesler Way, Suite 301
Seattle, WA 98104
(206) 464-0838

DON SAUNDERS
National Legal Aid and Defender Association
1625 K Street NW
Suite 800
Washington, DC 20006
(202) 452-0620

*Counsel of Record

August, 1996

---

[22] A claim for prospective injunctive relief from unconstitutional disciplinary procedures is in essence no different from a claim for prospective injunctive relief from other unconstitutional conditions of confinement. There is no dispute that such claims are properly brought pursuant to § 1983. *See, e.g., Helling v. McKinney*, 113 S. Ct. 2475 (1993).